



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 465 689



HARVARD LAW LIBRARY

Received AUG 1 1919

REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between June 4, 1918, and September 6, 1918.

PERRY S. RADER,
REPORTER.

VOL. 275.

COLUMBIA, MO.:
E. W. STEPHENS PUBLISHING CO.
1918

Entered according to act of Congress in the year 1918 by
E. W. STEPHENS PUBLISHING CO.
In the office of the Librarian of Congress at Washington, D. C

AUG 1 1919

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

HON. HENRY W. BOND, Chief Justice.
HON. WALLER W. GRAVES, Judge.
HON. ROBERT FRANKLIN WALKER, Judge.
HON. CHARLES B. FARIS, Judge.
HON. JAMES T. BLAIR, Judge.
HON. ARCHELAUS M. WOODSON, Judge.
HON. FRED L. WILLIAMS, Judge.

FRANK W. McALLISTER, Attorney-General.
J. D. ALLEN, Clerk.
H. C. SCHULT, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS

DIVISION ONE.

HON. JAMES T. BLAIR, Presiding Judge.

HON. WALLER W. GRAVES, Judge.

HON. HENRY W. BOND, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. STEPHEN S. BROWN, Commissioner.

HON. ROBERT T. RALEY, Commissioner.

DIVISION TWO.

HON. ROBERT FRANKLIN WALKER, Presiding Judge.

HON. CHARLES B. FARIS, Judge.

HON. FRED L. WILLIAMS, Judge.

HON. REUBEN F. ROY, Commissioner.

HON. JOHN TURNER WHITE, Commissioner.

TABLE OF CASES REPORTED IN THIS VOLUME.

A

Allen, City of St. Louis v.	501
Allen, State v.	391
Atkinson, State ex rel. Electric Company of Missouri v.	325
Andrain County (State ex rel.) v. Hackmann	534

B

Ball & Gunning Milling Company, McMillan & Parker v.	1
Barber v. Nunn	565
Barron, Murphy v.	282
Bell v. George	17
Blakemore, State ex rel. Dunklin County v.	695
Boyce, Shanklin v.	5
Bufton (Lloyd and), Miller v.	35
Burke and Ennis v. Murphy	397
Burton v. Chicago & Alton Railroad Company	185
Bush (State ex rel. Missouri Pacific Railway Company and) v. Public Service Commission	60

C

Carter, Administrator of Ridgeway v. Metropolitan Life Insurance Company	84
Chicago & Alton Railroad Company, Burton v.	185
Chicago & Alton Railway Company (State ex rel.) v. Public Serv- ice Commission	72
Chicago, Burlington & Quincy Railroad Company, Lige v.	249
City of Fulton v. Public Service Commission	67
City of Joplin, Wright v.	212
City of St. Louis v. Allen	501
City of Sedalia (State ex rel.) v. Public Service Commission	201
City of University City v. Schall, Administrator of Coyle	667
Clark, State ex rel. Waterworth v.	95
Cone v. Donovan	557
Consolidated School District No. 2 of Platte County, State ex inf. McAllister v.	522
Coyle (Schall, Administrator of), City of University City v.	667
Critzler, In Matter of	514
Cunningham and Lipscomb, Lawson and Shields v.	128

D

Danciger & Company (State ex rel.) v. Public Service Commission	483
Denker, St. Charles Savings Bank v.	607
Donovan, Cone v.	557
Dunklin County (State ex rel.) v. Blakemore	695

E

Electric Company of Missouri (State ex rel.) v. Atkinson	325
Ennis (Burke and) v. Murphy	397

(v)

F

Fleming, State ex rel. Mills v.	509
Fulton (City of) v. Public Service Commission	67

G

George, Bell v.	17
Guinotte, State ex rel. McClintock v.	298

H

Hackley & Hume Company, Ltd., Saunders v.	41
Hackmann, State ex rel. Audrain County v.	534
Hackmann, State ex rel. Kelly v.	636
Hackmann, State ex rel. Lamkin v.	47
Ham, Inter-River Drainage District v.	384
Harper, Hiemenz v.	380
Harty, State ex rel. Waterworth v.	59
Herminghausen, White v.	687
Hiemenz v. Harper	380

I

In Matter of Critzer	514
In re Webers	677
Inter-River Drainage District v. Ham	384

J

Joplin (City of), Wright v.	212
----------------------------------	-----

K

Kansas City Bolt & Nut Company v. Kansas City Light & Power Company	529
Kansas City Light & Power Company, Kansas City Bolt & Nut Company v.	529
Kansas City Southern Railway Company, Laughlin v.	459
Kelly (State ex rel.) v. Hackmann	636
Knights of the Maccabees of the World, Zinke v.	660
Koehler v. Rowland	573
Koontz, State v.	475
Kupferle Foundry Company v. St. Louis Merchants Bridge Terminal Railway Company	451

L

Lamkin (State ex rel.) v. Hackmann	47
Laughlin v. Kansas City Southern Railway Company	459
Lawson and Shields v. Cunningham and Lipscomb	128
Lige v. Chicago, Burlington & Quincy Railroad Company	249
Lipscomb (Cunningham and), Lawson and Shields v.	128
Lloyd and Bufton, Miller v.	35
Long, State ex rel. Perkins v.	169
Ludlow-Saylor Wire Company v. Wollbrinck	339

Mc

McAllister (State ex inf.) v. Consolidated School District No. 2 of Platte County	522
McClintock (State ex rel.) v. Guinotte	293
McMillan & Parker v. Ball & Gunning Milling Company	1

M

Metropolitan Life Insurance Company, Carter, Administrator of Ridgeway v.	84
--	----

Miller v. Lloyd and Bufton	35
Mills (State ex rel.) v. Fleming	509
Missouri Pacific Railway Company and Bush (State ex rel.) v. Public Service Commission	60
Murphy v. Barron	282
Murphy, Burke and Ennis v.	397

N

Nagle, Rottink v.	196
Nunn, Barber v.	565

O

Oakley v. Richards	266
--------------------------	-----

P

Perkins (State ex rel.) v. Long	169
Public Service Commission, City of Fulton v.	67
Public Service Commission, State ex rel. Chicago & Alton Railway Company v.	72
Public Service Commission, State ex rel. City of Sedalia v.	201
Public Service Commission, State ex rel. Danciger & Company v.	483
Public Service Commission, State ex rel. Missouri Pacific Rail- way Company and Bush v.	60
Public Service Commission, State ex rel. Watts Engineering Com- pany v.	108

Q

Quercus Lumber Company, Williams Coeperage Company v.	4
--	---

R

Reynolds and Sterns Tire & Tube Company, State ex rel. Wurde- man and Smalley v.	113
Richards, Oakley v.	266
Ridgeway (Carter, Administrator of) v. Metropolitan Life Insur- ance Company	84
Rose v. Springfield & Brookline Special Road District	590
Rottink v. Nagle	196
Rowland, Koehler v.	573
Rule, Wigginton v.	412

S

St. Charles Savings Bank v. Denker	607
St. Louis (City of) v. Allen	501
St. Louis Merchants Bridge Terminal Railway Company, Kupferle Foundry Company v.	451
Saunders v. Hackley & Hume Company, Ltd.,	41
Schaden, Administratrix of Townsend, Townsend v.	227
Schall, Administrator of Coyle, City of University City v.	667
Sedalia (State ex rel. City of) v. Public Service Commission	201
Shanklin v. Boyce	5
Shields (Lawson and) v. Cunningham and Lipscomb	128
Smally (State ex rel. Wurdeman and) v. Reynolds and Sterns Tire & Tube Company	113
Springfield & Brookline Special Road District, Rose v.	590
State v. Allen	391
State v. Koontz	475
State v. Stemmons	544
State ex inf. McAllister v. Consolidated School District No. 2 of Platte County	522
State ex rel. Audrain County v. Hackmann	534

State ex rel. Chicago & Alton Railway Company v. Public Service Commission	72
State ex rel. City of Sedalia v. Public Service Commission	201
State ex rel. Danciger & Company v. Public Service Commission	483
State ex rel. Dunklin County v. Blakemore	695
State ex rel. Electric Company of Missouri v. Atkinson	325
State ex rel. Kelly v. Hackmann	636
State ex rel. Lamkin v. Hackmann	47
State ex rel. McClintock v. Guinotte	298
State ex rel. Mills v. Fleming	509
State ex rel. Missouri Pacific Railway Company and Bush v. Public Service Commission	60
State ex rel. Perkins v. Long	189
State ex rel. Waterworth v. Clark	95
State ex rel. Waterworth v. Harty	59
State ex rel. Watts Engineering Company v. Public Service Commission	108
State ex rel. Wurdeman and Smalley v. Reynolds and Sterns Tire & Tube Company	113
Stemmons, State v.	544
Sterns Tire & Tube Company (Reynolds and), State ex rel. Wurdeman and Smalley v.	113

T

Townsend v. Schaden, Administratrix of Townsend	227
---	-----

U

University City (City of) v. Schall, Administrator of Coyle	667
---	-----

W

Waterworth (State ex rel.) v. Clark	95
Waterworth (State ex rel.) v. Harty	59
Watts Engineering Company (State ex rel.) v. Public Service Commission	108
Webers, In re	677
White v. Herminghausen	687
Wigginton v. Rule	412
Williams Cooperage Company v. Quercus Lumber Company	4
Wollbrinck, Ludlow-Saylor Wire Company v.	339
Wright v. City of Joplin	212
Wurdeman and Smalley (State ex rel.) v. Reynolds and Sterns Tire & Tube Company	113

Z

Zinke v. Knights of the Maccabees of the World	660
--	-----

TABLE OF CASES OVERRULED OR DISAPPROVED.

State ex rel. City of St. Louis v. Laclede Gaslight Co., 102 Mo. 472 (in part)	67
---	----

TABLE OF CASES CITED

IN THIS VOLUME.

A

Abbott v. Railroad, 83 Mo. 280	388
Abeles v. Pillman, 261 Mo. 376	239
Ackerman v. Green, 195 Mo. 124	181
Adams v. Wiggins Ferry Co., 27 Mo. 95	457
Adlum v. Ward, 1 Rawle, 171	157
Albers v. Moffitt, 262 Mo. 645	127
Alderman v. Wells, 85 S. C. 507	359
Aldermen v. Wells, 67 S. E. (S. C.) 781	380
Almy v. California, 24 Howard, 169	370, 372
Amsterdam v. Dupont, etc., Powder Co., 62 Pa. Sup. Ct. 314	458
Andre v. Mertens, 88 N. J. L. 628	276, 277
Armstrong v. Village of Fort Edward, 159 N. Y. 315	649
Atlantic Coast Line v. Goldsboro, 232 U. S. 548	210
Atlee v. Fink, 75 Mo. 100	649
Aurora v. McGannon, 138 Mo. 38	354
Austin v. Loring, 63 Mo. 19	150
Avery v. Vermont Elec. Co., 75 Vt. 235	496

B

B. P. O. E. v. Koeln, 262 Mo. 444	518
Bacon v. Walker, 204 U. S. 311	211
Bagnell v. Railway, 242 Mo. 20	702
Bailey v. McAlpine, 122 Ga. 616	626
Baird v. Cit. Ry. Co., 146 Mo. 265	181
Baker v. Baker, 43 Ind. App. 26	244
Baldwin v. Whitcomb, 71 Mo. 651	573
Bangs Mllg. Co. v. Burns, 152 Mo. 380	615
Bank v. Richmond, 235 Mo. 542	706
Bank v. Rockefeller, 195 Mo. 42	334
Bank of Brighton v. Smith, 90 Am. Dec. (Mass.) 144	627
Barnes v. Webster, 16 Mo. 265	704
Bates v. Werries, 196 S. W. 1126	121
Bedford v. Sykes, 168 Mo. 8	588
Bell v. Ham, 188 Mo. App. 81	33
Bell v. Warehouse Co., 205 Mo. 493	94
Bell's Gap R. R. v. Pennsylvania, 134 U. S. 232	359
Bennett v. Woody, 137 Mo. 377	521
Benoist v. Murrin, 58 Mo. 307	446
Benson v. Railroad, 78 Mo. 504	388
Benton v. St. Louis, 248 Mo. 98	457
Bessonies v. Indianapolis, 71 Ind. 189	508
Black v. Early, 208 Mo. 281	541
Blackburn v. Railroad, 180 Mo. App. 548	457
Blair v. Perpetual Ins. Co., 10 Mo. 350	628
Bobb v. Wolff, 148 Mo. 335	408, 409
Boogher v. Frazier, 99 Mo. 325	150
Book v. Beasley, 138 Mo. 455	409
Bowles v. Troll, 262 Mo. 382	121
Brady v. Railroad, 206 Mo. 537	458
Branch v. Klatt, 165 Mich. 671	277

Brehoney v. Pottsville Union Traction Co., 218 Pa. 123	262, 263
Brightwell v. McAfee, 249 Mo. 562	408
Brooks v. Gaffin, 192 Mo. 228	581, 584
Brooks v. Gaffin, 196 Mo. 357	584
Brown v. Brown, 106 Mo. 611	200
Brown v. Gerald, 100 Me. 351	496
Brown v. Maryland, 12 Wheat. 444	370, 371
Brushaber v. Un. Pac. Ry., 240 U. S. 17	349, 370
Buckner v. Horse & Mule Co., 221 Mo. 710	458
Buford v. Gruber, 223 Mo. 231	446
Buford v. Moore, 177 S. W. 872	239
Burke v. Adams, 80 Mo. 511	242

C

Cameron v. K. C. Com. Co., 22 Mont. 312	458
Camp v. Wood, 76 N. Y. 95	276
Campbell v. Shaw, 11 Hawaii, 112	380
Cantwell v. Lead Co., 199 Mo. 1	125
Cape Gir. R. R. Co. v. Bridge Co., 215 Mo. 286	150
Carpenter v. Lathrop, 51 Mo. 483	604
Carpenter v. St. Joseph, 263 Mo. 712	702
Carroll v. Tucker, 2 N. Y. Misc. 397	649, 650
Carter v. Prior, 78 Mo. 222	581
Castanie v. U. Rys. Co., 249 Mo. 192	474
Catron v. Lafayette Co., 106 Mo. 659	603
Cawker v. Meyer, 147 Wis. 320	496, 497
Celluloid Mfg. Co. v. Arlington Mfg. Co., 47 Fed. 4	616
Cent. Vermont Ry. Co. v. White, 238 U. S. 507, 59 Law Ed. 1433 ..	467
Chatham v. Lonsford, 149 N. C. 363	200
Cheltenham Fire-Brick Co. v. Cook, 44 Mo. 29	628
Chesapeake & Ohio Ry. Co. v. Cooper, 181 S. W. 933	468
Chicago & Alton R. R. Co. v. Tranbarger, 238 U. S. 67	210
C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561	211
Chicago Ry. Co. v. Devine, 239 U. S. 52, 60 Law Ed. 140	472
Chilton v. Nickey, 261 Mo. 243	30
Church v. Hadley, 240 Mo. 680	649, 652, 658
Cicero Lbr. Co. v. Cicero, 176 Ill. 9	508
City of St. Louis v. Speigel, 75 Mo. 146	353
Clark v. Thias, 173 Mo. 652	46
Clark County v. Hayman, 142 Mo. 434	704
Clyburn v. McLaughlin, 106 Mo. 521	150
Cohn v. Lehman, 93 Mo. 574	94
Coleman v. Hagey, 252 Mo. 135	46
Combs v. Construction Co., 205 Mo. 391	282
Commonwealth v. Shuman's Admrs., 6 Har. 343	157
Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261	573
Connelly v. Railroad, 169 Mo. App. 281	702
Conner v. Skagg, 213 Mo. 348	447
Cook v. Pennsylvania, 97 U. S. 566	370, 372
Coombs v. Coombs, 86 Mo. 178	245
Cope's Estate, 191 Pa. St. 22	378
Coulson v. La Plant, 196 S. W. 1146	239
County of Mecklenberg v. Beales, 111 Va. 691, 36 L. R. A. (N. S.) 285	676
Covington & Lexington Turnpike Co. v. Sanford, 164 U. S. 596 ..	337
Cowell v. Springs Co., 100 U. S. 55	585
Cox v. Volkert, 86 Mo. 505	125
Crews v. Lackland, 67 Mo. 621	702
Currier v. Music Hall, 135 Mass. 414	276

D

Dahl v. Valley Dredging Co., 145 N. W. (Minn.) 796	458
Dalby v. Maxfield, 244 Ill. 214	244
Dannefelser v. Weigel, 27 Mo. 45	616, 618
Danolds v. State, 89 N. Y. 36	651
Davidson v. New Orleans, 96 U. S. 97	359
Davis v. Glenn, 3 La. Ann. 444	621, 622
Davis v. Jacksonville So. Line, 126 Mo. 78	127
Deal v. Mississippi Co., 107 Mo. 468	655
Dean v. Railroad, 199 Mo. 411	457
Deere Plow Co. v. Sullivan, 158 Mo. 440	466
Deiner v. Sutermeister, 266 Mo. 505	474
De Lashmutt case, 261 Mo. 440	165
De Lassus v. Faherty, 164 Mo. 372	40
Del Mar L. & P. Co. v. Eshleman, 167 Cal. 666	496, 497
Devine v. Chicago, etc., 266 Ill. 248	472
Dickson v. Kempinsky, 96 Mo. 252	573
Dillivan v. German Savings Bank, 124 N. W. (Ia.) 350	244
Dobbins v. Commissioners, 16 Pet. 435	372
Douglass Land Co. v. Thayer Co., 107 Va. 292	474
Driscoll v. Driscoll, 143 Cal. 528	244
Duell v. Leslie, 207 Mo. 658	409
Dunn v. Railroad, 192 Mo. App. 260	465

E

East St. Louis v. Amy, 120 U. S. 600	541
Eberhard v. Ins. Co., 210 Fed. 520	125
Eberle v. Michigan, 232 U. S. 700	102
Edwards v. Lesueur, 132 Mo. 430	655
Egan v. Murray, 80 Iowa, 180	554
Eldridge v. Trezevant, 160 U. S. 452	389
Elkhart v. Murray, 165 Ind. 304	508
Elliott v. Sheppard, 179 Mo. 390, 78 S. W. 627	245
Elting v. Hickman, 172 Mo. 237	376
Embree v. K. C. & Liberty Blvd. Road Dist., 257 Mo. 593	260
Embree v. Patrick, 72 Mo. 173	132
Evans v. McFarland, 186 Mo. 727	541
Ewing v. United States, 153 C. C. A. 167	394
Ex parte Durbin, 102 Mo. 103	355
Ex parte Nelson, 251 Mo. 63	685
Ex parte Renfrow, 112 Mo. 591	646
Ex parte Roberts, 166 Mo. 212	350
Express Co. v. St. Joseph, 66 Mo. 675	354
Eyre v. Jacob, 14 Gratt. 422	312, 319

F

Fallsburg Co. v. Alexander, 101 Va. 98	496
Farmers Bk. of Deepwater v. Ogden, 192 Mo. App. 243	632
Father Matthew, etc., Society v. Fitzwilliam, 12 Mo. App. 445	629
Father Matthew, etc., Society v. Fitzwilliam, 84 Mo. 406	630
Faxon v. Butler, 206 Mass. 504	276, 277
Fearey v. O'Neill, 149 Mo. 473	707
Federal Surety Co. v. Ind. Mfg. Co., 176 Ind. 328	627
Felton v. Railroad, 69 Iowa, 577, 29 N. W. 618	262
First Nat. Bk. v. Frey, 216 Mo. 42	572
First Nat. Bk. v. Wright, 84 Iowa, 728	622
First Universalist Society v. Boland, 155 Mass. 171	587
Fischer v. St. Louis, 194 U. S. 371	280
Fischer v. Stekmann, 125 Mo. 165	150
Fitterer v. Crawford, 157 Mo. 51	513

Fleming v. Nor. Tissue Paper Mill, 114 N. W. 841	622
Flint v. Stone Tracy Co., 220 U. S. 149	370
Foley v. Harrison, 233 Mo. 460	247
Forrest v. Klassam, 7 Hill, 463	616, 617
Freeman v. Funk, 85 Kan. 477	200
Freeman v. Maxwell, 262 Mo. 24	146
Frost v. Frost, 200 Mo. 474	408
Fuller v. Rice, 4 Gray, 343	617
Fulton v. Freeland, 219 Mo. 494	446
Fulton v. Pub. Serv. Comm., 275 Mo. 67	533
Furness v. Ewing, 2 Barr, 479	157

G

Gallagher v. Gallagher, 87 N. Y. Supp. 343	616, 618
Galveston, etc., v. Baumgarten, 31 Tex. Civ. App., 253	474
Galveston, H. & S. A. Ry. Co. v. Long, 36 S. W. (Tex.) 485	261, 263
Gantt v. Brown, 244 Mo. 300	59
Garrett v. Wiltsee, 252 Mo. 699	583
Garrison v. Taff, 197 S. W. 274	30
Gasconade County v. Gordon, 241 Mo. 569	102
German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189	500
Gilmer v. Baker, 24 W. Va. 72	626
Glasgow v. Rowse, 43 Mo. 479	351, 352, 354, 366, 369, 377
Goll v. Railroad, 271 Mo. 655	388
Graham v. Horton, 6 Kan. 353	652
Grand Tr. West. Ry. Co. v. Railroad Comm. of Indiana, 221 U. S. 400	81
Great Western Life Assur. Co. v. Shumway, 25 N. D. 268	626
Greeley v. Bank, 103 Mo. 212	125
Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899	245
Grimm v. Tittman, 113 Mo. 56	563
Grybowski v. Erie R. R. Co., 95 Atl. (N. J.) 764	473
Guarantee Co. of No. Am. v. Phenix Ins. Co., 124 Fed. 170	626
Gust v. Hoppe, 201 Mo. 298	572

H

Hackett v. W. U. Tel. Co., 80 Wis. 190	621, 622
Hall v. Mfg. C. & C. Co., 260 Mo. 365	465, 466
Hall v. U. S. Fid. & Guar. Co., 77 Minn. 24	627
Hanser v. Bieber, 271 Mo. 335	467
Harris v. Bond Co., 244 Mo. 687	350
Harris v. Gibbins, 114 Cal. 418	651
Harrison v. Ins. Co., 8 Mo. App. 37	632
Hartford Fire Ins. Co. v. Casey, 191 S. W. 1072	632
Harvey v. Long, 260 Mo. 386	242
Hauser v. Murray, 256 Mo. 58	581
Hayes v. Manning, 263 Mo. 1	410, 411
Hayes v. Schall, 229 Mo. 114	30
Haynes v. Waite, 14 Cal. 446	705
Hays v. Poplar Bluff, 263 Mo. 516	279, 508
Heard v. School District, 45 Mo. App. 660	604
Hector v. Mann, 225 Mo. 228	150
Heinbach v. Heinbach, 274 Mo. 301	449
Henderson v. Koenig, 192 Mo. 709	248
Henry County v. Salmon, 201 Mo. 166	705
Hickory Co. v. Fugate, 143 Mo. 79	127
Higgins v. Higgins, 243 Mo. 164	621, 623
Hollis v. Merchant's Assn., 205 Mo. 520	276
Holton v. Cochran, 208 Mo. 314	446

Hood v. Nicholson, 137 Mo. 400	182
Hopkins v. Grimshaw, 165 U. S. 342	587
Howell v. Jackson County, 262 Mo. 403	521
Hughes v. United States, 230 U. S. 24	389
Hughes v. Eyssell, 167 Mo. App. 564	702
Hunt v. Searcy, 167 Mo. 158	15, 16
Huntington v. Love, 106 Pac. 185	621
Hurst v. Railroad, 163 Mo. 309	470

I

Ill. Cent. R. R. Co. v. Skaggs, 240 U. S. 66, 60 Law Ed. 528	468
Independence v. Gates, 110 Mo. 382	376, 377
In re Estate of Lague, 267 Mo. 116, 183 S. W. 611	240
In re Kansas City C. R. Co., 2 Mo. P. S. C. 417	335
In re State House Fund, 19 R. I. 391, 20 R. I. 707	652

J

Jackson v. Railroad, 217 Mass. 515	266
Jackson v. United States, 230 U. S. 1	389
James v. Mut. Reserve etc., Assn., 148 Mo. 1	466
Jenkins v. Ewin, 8 Helsk. 456	355

K

Kane v. Railroad, 251 Mo. 13, 157 S. W. 644	473
Kansas City v. Smith, 238 Mo. 323	581
Kansas City v. Whipple, 136 Mo. 475	354, 376, 377
Kelerher v. Henderson, 203 Mo. 511	94
Kellogg v. Moore, 196 S. W. 15	30
Kelly v. Palmer, 91 Minn. 135	200
Keltner v. Harris, 196 S. W. 1	585
Kent v. Waite, 10 Pick. 138	651
Kerbaugh v. Caldwell, 80 C. C. A. 470	458
Kerstner v. Vorweg, 130 Mo. 196	581
Kille v. Gooch, 184 S. W. 1160	239
Kinney v. Koopman & Gerdes, 116 Ala. 310	458
Kissam v. Forrest, 25 Wend. 651	616, 617
Knapp v. Trust Co., 199 Mo. 640	446
Knélp v. Schroeder, 255 Ill. 621	587
Knight v. Knight, 178 Ill. 558	200
Knisely v. Leathe, 178 S. W. 453	149
Knott v. Peterson, 125 Iowa, 404	625
Knowlton v. Moore, 178 U. S. 82	370, 373
Knoxville Water Co. v. Knoxville, 189 U. S. 434	71

L

Laclede Land & Imp. Co. v. Goodno, 181 S. W. 413	34, 244
Lac. Nat. Bk. v. Richardson, 156 Mo. 270	466
Laddonia v. Day, 265 Mo. 383	224, 227
Lake Shore & Mich. So. Ry. v. Ohio, 173 U. S. 285	211
Lamar v. City of Lamar, 128 Mo. 216	542
Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 64 Am. St. Rep. 475	627
Landrum v. Jordan, 203 U. S. 62	621
Leakey v. Maupin, 10 Mo. 370	313
Lee v. Brown, 21 Kan. 458	625
Lee v. Conran, 213 Mo. 404	581
Lee v. Railway, 195 Mo. 400	181
Leloup v. Mobile, 127 U. S. 640	370, 372
Lewis v. Shows Co., 98 Kan. 148	277
Lexington v. Lafayette Co. Bk., 165 Mo. 671	102
Little v. Holyoke, 177 Mass. 116	276, 277

Little v. James McCord Co., 151 S. W. (Tex.) 835	458
Long v. Coal & Iron Co., 233 Mo. 738	706
Lott v. Hubbard, 44 Ala. 603	370
Low v. R. P. K. Pres. Met. Co., 91 Conn. 91, L. R. A. 1917D	125
Lowe v. Summers, 69 Mo. App. 637	682

Mc

McClanahan v. West, 100 Mo. 309	150
McCleery v. Lewis, 104 Me. 37, 70 Atl. 540	34
McCormick v. City of St. Louis, 166 Mo. 315	666
McCormick v. Railroad, 57 Mo. 433	388
M'Culloch v. Maryland, 4 Wheat. 316	650
McDermott v. Sedgwick, 140 Mo. 182	94
McDermott v. Railroad, 73 Mo. 518	615
McGrew v. Paving Co., 247 Mo. 570	350
McLaughlin v. McLaughlin, 228 Mo. 635	291, 293
McMillan & Parker v. Milling Co., 190 Mo. App. 349	3
McPherson v. Andes, 75 Mo. App. 204	474
McShane v. Howard Bank, 73 Md. 135, 10 L. R. A. 522	626

M

Macom v. Brewster, 273 Mo. 616	227
Magoun v. Ill. T. & S. Bk., 170 U. S. 283, 18 Sup. Ct. 594	312
Maguire v. University, 271 Mo. 359	316, 320
Malecek v. Tower Grove R. R. Co., 57 Mo. 21	615
Manion Blacksmith Co. v. Carreras, 19 Mo. App. 162	245
Manitou v. First Nat. Bank, 37 Colo. 344	649
Marbary v. McClurg, 74 Mo. 575	573
Marquis Case, 85 Mo. 615	16
Marston v. Reynolds, 211 Mass. 592	276, 277
Marwedel v. Cook, 154 Mass. 235	276, 277
Masonic Mutual v. Lackland, 97 Mo. 137	474
Matthews v. Matthews, 6 N. Y. S. 589	616, 618
Maxwell v. Hartmann, 50 Wis. 664	621
Mayor v. Sands, 105 N. Y. 210	649
Mayor of Baltimore v. Radecke, 49 Md. 217	507
Meenach v. Crawford, 137 S. W. 882	467
Mendota Club v. Anderson, 101 Wis. 479	621
Meyer v. Hope, 101 Wis. 123	200
Michigan Central R. R. Co. v. Powers, 201 U. S. 245	359
Miles v. Robertson, 258 Mo. 724	242
Miller v. Brooks, 120 Ga. 232	621
Miller v. Chandler, 163 Ky. 301	458
Milliman v. Railroad, 66 N. Y. 642	262, 264
Mills v. Railroad, 90 S. E. (N. C.) 221	262
Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429	496
Minor v. Burton, 228 Mo. 558	239, 581
Moberly v. Lotter, 266 Mo. 457	684, 686
Molin v. Wis. L. & L. Co., 143 N. W. 624	458
Moore v. Curry, 176 Mich. 456	587
Moore v. McNulty, 164 Mo. 120	563
Mosher v. Bacon, 229 Mo. 358, 129 S. W. 680	34
Mott v. Morris, 249 Mo. 137	583
Munn v. Illinois, 94 U. S. 113	494
Myers v. Pittsburg Coal Co., 233 U. S. 193, 58 Law Ed. 911	465
Myers v. Schuchmann, 182 Mo. 159	95

N

Nalley v. Home Ins. Co., 250 Mo. 452	107
Nanson v. Jacob, 93 Mo. 331	150

Nash v. Minneapolis Ry. Co., 131 Minn. 166	472
Nashville Railway v. Henry, 158 Ky. 88, 164 S. W. 314	472
National Press Brick Co. v. Const. Co., 177 Mo. App. 573	3
Nephler v. Woodward, 200 Mo. 179	276, 277
New Theater Co. v. Hartlove, 123 Md. 86	276, 277
Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487	500
N. Pac. Ry. v. N. Dakota, 216 U. S. 579	646
N. St. L. Gymnastic Soc. v. Hudson, 12 Mo. App. 342	513
Nunnemacher v. State, 129 Wis. 190	312

O

O'Day v. Annex Realty Co., 191 S. W. 46	244
Opinion of the Justices, 77 N. H. 600	368, 374
Opinion of the Justices, 195 Mass. 607	368, 374
Opinion of the Justices, 220 Mass. 624	367, 370, 373
Organ v. Bunnell, 184 S. W. 104	34
Overton v. Overton, 131 Mo. 559	181

P

Pac. Mut. Life Ins. Co. v. Glaser, 245 Mo. 390	93
Panhandle Railway v. Brooks, 199 S. W. (Tex.) 665	472
Patterson v. Camden, 25 Mo. 22	694
Patterson v. Yancey, 97 Mo. App. 698	702
Patton v. Fox, 169 Mo. 106	94
Peck v. Yale Amusement Co., 195 S. W. 1033	277
People v. Supervisors, 9 Wend. 508	651
People's Bk. v. Scalzo, 127 Mo. 164	127
Perry v. Rochester Line Co., 219 N. Y. 60	458
Perry v. Strawbridge, 209 Mo. 621	311
Phelan v. Paving Co., 227 Mo. 666	457
Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401	621
Philadelphia etc., Co. v. Pennsylvania, 122 U. S. 326	370, 372
Pinson v. Young, 100 Kan. 542, 164 Pac. 1102	458
Pitman v. Drabelle, 267 Mo. 84	350
Pittsburgh C. C. & St. L. R. R. Co. v. Vandyne, 57 Ind. 576	262, 264
Plessy v. Ferguson, 163 U. S. 537	585
Pollman Coal Co. v. St. Louis, 145 Mo. 651	666
Pollock v. Farmers' L. & T. Co., 157 U. S. 429	349, 370, 374
Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601	370, 373, 374
Postal Telegraph Co. v. Adams, 155 U. S. 688	372
Process Co. v. Continental Insurance Co., 175 Mo. App. 317	102
Proctor v. Nance, 220 Mo. 104	150, 157
Prussak v. Hutton, 51 N. Y. S. 761	458
Pugh v. Hayes, 113 Mo. 431	146
Pullen v. Commrs., 66 N. C. 361	312
Purnell v. Page, 133 N. C. 126	380

R

Putnam v. Railroad, 55 N. Y. 108	261, 263
Railroad v. Barron, 173 Mo. App. 370	288
Railroad v. Pfau, 212 Mo. 398	519
Railroad v. Railroad, 138 Mo. 591	295, 296
Railroad Co. v. Jackson, 7 Wall. 262	370, 372
Randle v. Pac. R. Co., 65 Mo. 325	621, 622, 623
Randolph v. Ellis, 240 Mo. 216	588
Redmon v. Railroad, 185 Mo. 12	615
Reed v. Railway, 50 Mo. App. 504	457
Reese v. Trust Co., 218 Pa. 150	244
Reeves case, 97 Mo. 676	554

Richmond v. Creel, 253 Mo. 257	354
Richmond v. Dudley, 129 Ind. 112	507
Ridgeway v. Holliday, 59 Mo. 444	572
Roberts v. Railroad, 153 Mo. App. 644	615
Robinson v. Dryden, 118 Mo. 534	572
Robinson v. Reynolds, 176 S. W. 5	200
Rourke v. Railroad, 221 Mo. 46	450
Ruddick v. Railroad, 116 Mo. 31	584

S

St. Joe Ry. Co. v. Shambough, 106 Mo. 571	656
St. Louis v. Fischer, 167 Mo. 662	280
St. Louis v. McCann, 157 Mo. 301	354
St. Louis v. Sternberg, 69 Mo. 301	354
St. Louis v. United Rys. Co., 263 Mo. 449	323, 354, 357, 358
St. Louis R. R. Co. v. Craft, 115 Ark. 483, 171 S. W. 1185, 35 Sup. Ct. Rep. 704	472
Salmen Falls Bk. v. Leyser, 116 Mo. 51	127
San Antonio v. Potter, 31 Tex. Civ. App. 263	474
Sanders v. Anchor Line, 97 Mo. 30	355
Sauerbrunn v. Ins. Co., 220 N. Y. 363	125
Sayre v. Trustees, 192 Mo. 126	447
Schoenlaw v. Friese, 14 Mo. App. 436	456
School Dist. v. Sheldley, 138 Mo. 690	94
Schooler v. Schooler, 258 Mo. 91	242
Scott v. McCann, 76 Md. 47	617
Scott v. Realty Co., 241 Mo. 112	666
Scott v. Scott, 95 Mo. 300	694
Scovill v. Glasner, 79 Mo. 455	615
Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 499, 58 Law Ed. 1068, L. R. A. 1915C 1, Ann. Cases 1915B 475	472
Seaboard Air Line Ry. Co. v. Moore, 228 U. S. 433, 57 Law Ed. 907	467
Seek v. Haynes, 68 Mo. 13	411
Sells v. Railroad, 266 Mo. 177	93
Sharp v. Cheatham, 88 Mo. 498	572
Sheppard v. Wagner, 240 Mo. 409	409
Shepperd v. Fisher, 206 Mo. 208	586
Shohoney v. Railroad, 231 Mo. 147	94
Sidway v. Mo. Land, etc., Co., 163 Mo. 342	181
Sims v. Brown, 252 Mo. 58	583
Slicer v. Owens, 241 Mo. 323	239
Sloan v. Railroad, 61 Mo. 24	71
Smith v. Mercantile Co., 170 Mo. App. 34	584
Smith v. Mine & Smelter Co., 88 Pac. (Utah) 683	458
Smith v. Warden, 19 Pa. St. 424	157
Snell v. Harrison, 104 Mo. 158	573
Snider v. McAtee, 178 S. W. 484	240, 241
Snyder v. Snover, 56 N. J. L. 20	200
Sonnenfeld v. Rosenthal, 247 Mo. 266	279
So. States Mut. Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91	92
Spohn v. Railroad, 87 Mo. 74	262
Spohn v. Railroad, 101 Mo. 417	266
Sprague v. Rooney, 104 Mo. 360	94
Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397	370
Starrett v. Barber, 20 Me. 461	705
State v. Bank of Missouri, 45 Mo. 528	650
State v. Bengsch, 170 Mo. 81	315, 370, 376
State v. Bixman, 162 Mo. 1	323
State v. Brassfield, 81 Mo. 159	552
State v. Brown, 188 Mo. App. 248	481
State v. Bruton, 253 Mo. 370	551

State v. Burns, 237 Mo. 216	480, 482
State v. Distilling Co., 236 Mo. 268	323
State v. Eisenhour, 182 Mo. 140	552
State v. Faulkner, 175 Mo. 546, 75 S. W. 116	551
State v. Fogg, 206 Mo. 696	552, 557
State v. Grugin, 147 Mo. 56	556
State v. Hall, 189 Mo. 267	571
State v. Hamlin, 25 L. R. A. (Maine) 632	319
State v. Heed, 57 Mo. 252	551
State v. Hill, 91 Mo. 423	552
State v. Hunter, 181 Mo. 316, 80 S. W. 955	551
State v. Lane, 193 S. W. 948	481
State v. Long, 238 Mo. 383	551
State v. Long, 257 Mo. 208	551
State v. Millsaps, 69 Mo. 359	682
State v. Mitchell, 229 Mo. 698	555
State v. Morgan, 124 Mo. 475	394
State v. Moulton, 262 Mo. 137	106
State v. Mudd, 232 Mo. 573	394
State v. Norton, 201 Mo. 1	684
State v. Pipkin, 221 Mo. 460	553
State v. Pub. Serv. Comm., 194 S. W. 291	208
State v. Rawlings, 232 Mo. 544	478
State v. Reed, 153 Mo. 453	553
State v. Rice, 80 Atl. 1026	102
State v. Richardson, 248 Mo. 563, 153 S. W. 727	551
State v. Rosenberger, 212 Mo. 648	479
State v. Sublett, 191 Mo. 172	551, 556, 571
State v. Sutton, 232 Mo. 249	553
State v. Teeter, 239 Mo. 487	551
State v. Theodore, 191 S. W. 422	479
State v. Vickers, 209 Mo. 29	571
State v. Walker, 232 Mo. 265	552, 557
State v. West Duluth Land Co., 75 Minn. 456	649
State v. Wheeler, 108 Mo. 658	552
State v. Willson, 265 Mo. 1	394, 682
State v. Wingfield, 115 Mo. 428	479
State ex inf. v. Clardy, 267 Mo. 381	183, 185
State ex inf. v. Duncan, 265 Mo. 45	543
State ex inf. v. Kansas City Gas Co., 254 Mo. 535	206
State ex inf. v. McClain, 187 Mo. 412	181
State ex inf. v. Smith, 271 Mo. 163	524, 525
State ex inf. v. Southern, 265 Mo. 286	107
State ex inf. v. Taylor, 208 Mo. 452	180
State ex inf. v. Tobacco Co., 177 Mo. 1	107
State ex rel. v. Allen, 183 Mo. 292	541
State ex rel. v. Aloe, 152 Mo. 477	655
State ex rel. v. Bell, 119 Mo. 70	107
State ex rel. v. Brewing Co., 270 Mo. 100	481
State ex rel. v. Broadus, 210 Mo. 14	181
State ex rel. v. Claxton, 263 Mo. 701	527
State ex rel. v. County Court, 128 Mo. 442	107
State ex rel. v. Denton, 229 Mo. 187	123, 124
State ex rel. v. Dierkes, 214 Mo. 578	646
State ex rel. v. Frear, 148 Wis. 456	359, 380
State ex rel. v. Frear, 1915 B. L. R. A. 592	370
State ex rel. v. Gantt, 274 Mo. 490	102
State ex rel. v. Gordon, 266 Mo. 412	149
State ex rel. v. Henderson, 160 Mo. 190	314, 316, 319, 320, 322
State ex rel. v. Horn, 94 Mo. 165	704
State ex rel. v. Hoshaw, 86 Mo. 193	702
State ex rel. v. Johnson, 214 Mo. 656	513

State ex rel. v. Laclede Gaslight Co., 102 Mo. 472	71
State ex rel. v. Lewis, 256 Mo. 121	377
State ex rel. v. McQuillin, 256 Mo. 707	126
State ex rel. v. Miller, 100 Mo. 447	107
State ex rel. v. Mills, 231 Mo. 498	102
State ex rel. v. Moore, 74 Mo. 413	676
State ex rel. v. Nortoni, 201 Mo. 1	122
State ex rel. v. O'Gorman, 75 Mo. 378	704
State ex rel. v. Powell, 67 Mo. 395	676
State ex rel. v. Pub. Serv. Comm., 259 Mo. 713	206, 207
State ex rel. v. Pub. Serv. Comm., 269 Mo. 525	110, 112
State ex rel. v. Pub. Serv. Comm., 270 Mo. 442	495
State ex rel. v. Pub. Serv. Comm., 270 Mo. 559	350
State ex rel. v. Pub. Serv. Comm., 275 Mo. 201	71, 533
State ex rel. v. Railroad, 176 Mo. 443	195
State ex rel. v. Railroad, 246 Mo. 512	260
State ex rel. v. Renfrow, 112 Mo. 594	655
State ex rel. v. Reynolds, 256 Mo. 718	121, 122
State ex rel. v. Roach, 258 Mo. 561	107
State ex rel. v. Rogers, 79 Mo. 283	94
State ex rel. v. Rose, 84 Mo. 202	181
State ex rel. v. Sappington, 67 Mo. 533	704
State ex rel. v. School Dist. No. 5, 195 Mo. App. 507	528
State ex rel. v. Shain, 245 Mo. 78, 149 S. W. 479	124
State ex rel. v. Smith, 26 Mo. 231	705
State ex rel. v. Spokane R. R. Co., 154 Pac. 1110	494, 496, 498
State ex rel. v. Stone, 269 Mo. 344	29, 30
State ex rel. v. Switzler, 143 Mo. 287	376
State ex rel. v. Tate, 109 Mo. 270	702
State ex rel. v. Taylor, 224 Mo. 393	388, 543
State ex rel. v. Walker, 85 Mo. 41	646
State ex rel. v. Wells, 210 Mo. 620	106
State ex rel. v. Wilder, 197 Mo. 27	106
State ex rel. v. Wofford, 121 Mo. 68	655
State ex rel. v. Woodside, 254 Mo. 592	126
State ex rel. v. Y. M. C. A., 259 Mo. 233	513
State to use v. Atherton, 40 Mo. 209	632
State to use v. Bird, 22 Mo. 470	628
State to use v. O'Neill, 151 Mo. 67	573
State Public Utilities Commission ex rel. v. Railroad, 119 N. E. 310	65
Stauffer v. Railroad, 243 Mo. 316	465
Steines v. Franklin Co., 48 Mo. 167	603
Stetson v. Bank, 2 Ohio St. 167	625
Stevens v. Whitcomb, 16 Vt. 121	200
Stevenson v. Colgan, 91 Cal. 649	653
Stewart v. Lead Belt Land Co., 200 Mo. 290	33, 34
Stewart v. Thomas, 35 Mo. 202	573
Stillwell v. Hamm, 97 Mo. 579	127
Stivers v. Horne, 62 Mo. 473	572
Stoffel v. Schroeder, 82 Mo. 147	572
Story v. Story, 188 Mo. 110	448
Stratton's Independence v. Howbert, 231 U. S. 415	367, 368
Stricklen v. Combe Printing Co., 249 Mo. 614	103
Stroble v. Smith, 8 Watts, 280	157
Strode v. Commr., 52 Pa. 181	319
Sturm v. Atl. Mut. Ins. Co., 63 N. Y. 87	616, 618

T

Terminal Taxicab Co. v. Kutz, 241 U. S. 252	493
Third Nat. Bk. v. Owen, 101 Mo. 558	632
Thomas v. Thomas, 186 S. W. 993	443
Thomasson v. Mer. Town Mut. Ins. Co., 217 Mo. 485	127

Thompson v. Greeley, 107 Mo. 577	125
Thompson v. Langan, 172 Mo. App. 83	587
Thompson v. Lindsay, 242 Mo. 53	411
Thompson v. Livery Co., 214 Mo. 487	181
Thompson v. Pinnell, 237 Mo. 552	16
Thompson v. Railroad, 75 Hun, 548, 27 N. Y. S. 608	262
Thornbro v. Kan. R. R. Co., 91 Kan. 684, Ann. Cas. 1915 D 314 ..	472
Titus v. Development Co., 264 Mo. 246	29
Torrey v. Hardy, 196 S. W. 1100	667
Townsend v. Gash, 267 Ill. 578	651
Tranbarger v. Railroad, 250 Mo. 55	210
Treasurers of State v. Bates, 2 Bailey (S. C.) 362	626
Truitt v. Bender, 193 S. W. 839	239
Trustees v. Bailey, 81 Am. Dec. 194	652
Trustees v. Cowden, 240 Ill. 39	627
Tuttle v. Blow, 176 Mo. 171	126
Twentieth Cent. Mach. Co. v. Excelsior Co., 200 S. W. 1079	465
Tyler v. Wright, 164 Mich. 606	244

U

Union Savings Assn. v. Edwards, 47 Mo. 445	628
Union Stock Yards Co. v. Nashville Packing Co., 140 Fed. 701	584
United States v. Gausson, 86 U. S. 198	626
U. S. Glue Co. v. Town of Oak Creek, 38 U. S. 499	350

V

Valentine Co. v. Sloan, 53 Ind. App. 71	276
Van Dyke v. Geary, 244 U. S. 39	500
Van Raalte v. Harrington, 101 Mo. 602	572
Vicksburg Ry. Co. v. Putnam, 118 U. S. 545, 30 Law Ed. 257	472
Vogelgesang v. St. Louis, 139 Mo. 127	181

W

Wakefield v. Van Tassell, 202 Ill. 41	587
Walton v. Kendrick, 122 Mo. 504	563
Waring v. Savannah, 60 Ga. 100	369
Webb v. Hayden, 166 Mo. 39	146
Welch v. Mann, 193 Mo. 304	46
Weller v. Railroad, 120 Mo. 635	456
Welton v. Missouri, 91 U. S. 279	370
Wendover v. Baker, 121 Mo. 273	95
Westcott v. Railroad, 41 Wash. 618	266
Westminster College v. Piersol, 161 Mo. 270	623
Weston v. Charleston, 2 Peters, 449	370, 371
White v. Bank, 9 Heiskell, (Tenn.) 475	625
White v. Railroad, 230 Mo. 287	319, 322, 324
Whiteside v. United States, 93 U. S. 247	650
Wieder v. Union Surety & Guar. Co., 86 N. Y. 105	625
Wilcox v. Moore, 199 S. W. 136	30
Wilcox v. Phillips, 260 Mo. 680, 169 S. W. 55	34
Wilcoxson v. Darr, 139 Mo. 673, 41 S. W. 227	245
William v. Shackelford, 97 Mo. 322	293
Williams v. Railroad, 257 Mo. 87	467, 470
Williams Cooperage Co. v. Quercus Lbr. Co., 187 Mo. App. 373 ..	4
Wilson v. Greene, 60 Am. Dec. (Vt.) 279	626
Wingrove v. Pub. Serv. Comm., 74 W. Va. 190	496
Wis. River Imp. Co. v. Pier, 137 Wis. 325, 118 N. W. 857	497
Withers v. Railroad, 226 Mo. 373	581
Woas v. St. Louis Transit Co., 198 Mo. 664	262
Wolfgang v. Mod. Wood. Am., 167 Mo. App. 220	466

Woodson v. Railroad, 224 Mo. 707	458
Worley v. Dryden, 57 Mo. 226	409
Wren v. Sturgeon, 184 S. W. 1038	243
Wright v. Groom, 246 Mo. 163	279

Y

Yates v. Thomas, 71 N. Y. S. 1113	626
---	-----

Z

Zeis v. Brewing Assn., 205 Mo. 651	457
--	-----

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE

APRIL TERM, 1918.

(Continued from Vol. 274.)

McMILLAN & PARKER v. BALL & GUNNING
MILLING COMPANY, Appellant.

Division One, June 4, 1918.

MECHANIC'S LIEN; Subcontractor: Extra Work. The contract between the contractor and subcontractor called for the payment of a lump sum of \$7200 for labor and material to be furnished, and the subcontractor received \$6781.60 as a credit, leaving \$418.40 due him under the original contract; but after the work was commenced the contractor changed the plan of the work and ordered the subcontractor to furnish additional labor and material to the amount of \$400.35, which sum, added to the \$418.40 due under the original contract, made \$818.75, for which he had judgment against the contractor. *Held*, that the judgment for the entire sum of \$815.75 should be decreed a lien on the building, and the majority opinion of the Court of Appeals (190 Mo. App. 340) decreeing only the \$418.75 to be a lien is disapproved, and the reasoning and conclusions of the dissenting opinion (190 Mo. App. 352) that the subcontractor is entitled to a lien for the whole balance due is approved.

275 Mo.]

(1)

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins*, Judge.

AFFIRMED.

R. F. Stewart, John R. McCammon and R. M. Sheppard for appellant.

F. T. Stockhard and Gray & Gray for respondents.

BOND, J.—The plaintiffs, McMillan & Parker, subcontractors, sue to establish a mechanic's lien against certain property at Webb City, Missouri, owned by the Ball & Gunning Milling Company.

The undisputed facts are that the firm of Stone & Watts (original contractors and parties defendant in the circuit court) contracted with the Ball & Gunning Company to erect certain concrete wheat tanks; that thereupon they entered into an agreement with the plaintiffs to furnish the material and labor for the construction of said wheat tanks for the lump sum of \$7200; that plaintiffs did furnish labor and material in the construction thereof to the amount of \$7600.35; that they received therefor the sum of \$6760 in cash, plus a certain credit of \$21.60, which left a balance due them of \$818.75, for which amount they duly filed a lien against the property of the Ball & Gunning Company, designating it as a partnership and not as a corporation.

The evidence tended to show that the contract between plaintiffs and Stone & Watts only called for the payment of a lump sum of \$7200 for the material and labor to be furnished by them; that the total credits to be deducted from said sum was \$6781.60, which left \$418.40 due them under their original contract; that after the work was commenced, Stone & Watts changed the plan of the work and ordered plaintiffs to furnish additional labor and material to the amount of \$400.35; that this sum added to the

Parker v. Milling Co.

\$418.40 due them under their original contract made the \$818.75, for which judgment was prayed.

The case was tried without a jury and the court rendered judgment for plaintiffs and against defendant Watts for the full amount of the balance claimed to be due, \$818.75, and declared said judgment a lien upon the property of the Ball & Gunning Milling Company.

Thereupon the Ball & Gunning Company duly appealed to the Springfield Court of Appeals, which court reversed the judgment and remanded the cause with directions to the circuit court "to enter judgment against Watts in the sum of \$818.75 and make such judgment a lien against the real estate and improvements described belonging to the defendant, The Ball & Gunning Milling Company, in the sum of \$418.75, together with interest," etc. From this judgment ROBERTSON, P. J., filed his dissent and deeming the majority opinion in conflict with the case of National Press Brick Company v. Const. Co., 177 Mo. App. 573, certified the cause to this court for final determination.

After a careful examination of the two opinions of the Springfield Court of Appeals, we agree with the learned writer of the dissenting opinion, 190 Mo. App. l. c. 352, that the judgment ordered in the learned majority opinion, 190 Mo. App. 340, was incorrect under the testimony quoted in the dissenting opinion, and for the reasons stated therein. We, therefore, disapprove the judgment directed in the majority opinion of the Springfield Court of Appeals and approve the reasoning and conclusion of the dissenting opinion of ROBERTSON, P. J., and hence affirm the judgment of the trial court. It is so ordered. All concur.

H. D. WILLIAMS COOPERAGE COMPANY, Appel-
lant, v. QUERCUS LUMBER COMPANY.

Division One, June 4, 1918.

TRESPASS: Cutting Timber: Mere Licensee: Affirming Decision of Court of Appeals. The decision of the Court of Appeals, 187 Mo. App. 373, holding that a certain consent decree between plaintiff and the apparent record owner of land gave to plaintiff something more than a personal license to cut, but a beneficial ownership in, the growing timber, and that therefore plaintiff could maintain an action of trespass against a mere stranger who cut and carried away parts of the timber, is not in conflict with a prior decision of the Supreme Court, but is correct.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*,
Judge.

REVERSED AND REMANDED.

Douglas W. Robert for appellant.

Sheppard & Green for respondent.

BLAIR, J.—This cause was heard by the Springfield Court of Appeals. It was transferred here because one of the judges deemed the majority opinion in conflict with a decision of this court. We have reached the conclusion that the majority opinion of the Court of Appeals is correct. We think it properly distinguishes the decisions relied on by the dissenting judge. In accordance with the views expressed in that opinion (*Williams Cooperage Co. v. Quercus Lumber Co.*, 187 Mo. App. 373) the judgment is reversed and the cause remanded. All concur.

NATHANIEL SHANKLIN, Appellant, v. RICHARD
E. BOYCE et al.

Division One, June 4, 1918.

1. **GUARDIAN AND CURATOR: Appointment: Insane Person: No Notice.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving *Hunt v. Searcy*, 167 Mo. 158.]
2. ———: ———: ———: **Uselessness of Notice.** The suggestion that a notice of a lunacy inquiry to an insane person is useless and meaningless begs the question; for the issue to be tried is whether he is or is not insane, and to fail to give him notice on the ground that he is insane forestalls the very purpose of the inquiry.
3. **RECOVERY OF PROPERTY: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts, in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance.

Appeal from Grundy Circuit Court.—*Hon. Geo. W. Wanamaker*, Judge.

REVERSED AND REMANDED.

O. M. Shanklin, John W. Bingham, J. D. Allen, J. M. Davis & Son and Hubbell Bros. for appellant.

(1) While plaintiff was insane, confined in a hospital in St. Louis, the probate court conducted an

inquisition of insanity concerning him, and appointed a guardian of his person and estate, without notice to him, without his having any knowledge of it. Plaintiff contends that this original insanity inquisition is wholly void in law, for want of notice to him. *Hunt v. Searcy*, 167 Mo. 158; *Bank v. Shanklin*, 174 Mo. App. 642; *In re Lambert*, 66 Pac. Rep. 851, 134 Cal. 626; *Wilcox v. Phillips*, 260 Mo. 664; *Wheeler v. State*, 32 Am. Rep. 372, 34 Ohio St. 394; *In re Letcher*, 269 Mo. 148; *Hovey v. Elliott*, 167 U. S. 409; *McCurry v. Hooper*, 46 Am. Dec. 280, 12 Ala. 823; *Evans v. Johnson*, 45 Am. St. 912, 39 W. Va. 299; *Walters v. McKinnis*, 221 Fed. 746; *Cooley*, Const. Lim. (7 Ed.) p. 581; *Martin v. White*, 146 Fed. 461; *Stewart v. Taylor*, 63 S. W. 783, 23 Ky. L. Rep. 577, 182 U. S. 427; *Chaloner v. Sherman*, 242 U. S. 455; *State ex rel. v. Duncan*, 195 Mo. App. 541; *State ex rel. v. Guinotte*, 257 Mo. 1; *Smoot v. Judd*, 184 Mo. 508; *McGee v. Hayes*, 59 Pac. 767, 127 Cal. 336; *Hutchins v. Johnson*, 30 Am. Dec. 622, 12 Conn. 376; 10 Am. & Eng. Ann. Cas., p. 213; 16 Am. & Eng. Ency. Law (2 Ed.) p. 567. (2) *Caveat emptor* applies to any judicial sale. For a stronger reason it applies to the sale of the land of an insane person in ward, by his alleged guardian—and applies more strongly to this particular case, being one in which the vendee made an exchange or trade, in substance—instead of making a purchase for money. 21 Cyc. 145, 146; *Stone v. Railroad*, 261 Mo. 61; *Estes v. Alexander*, 90 Mo. 453; 17 Am. & Eng. Ency. Law (2 Ed.), p. 1010; *Union Trading Co. v. Drach*, 146 Pac. (Colo.) 767; *Frost v. Atwood*, 16 Am. St. 560, 73 Mich. 67; *Buchanan v. Edmisten*, 95 N. W. (Neb.) 620. (3) The inquisition of insanity is subject to collateral attack because it is void for want of notice. *Dutcher v. Hill*, 29 Mo. 271; *Webster v. Reid*, 11 How. (U. S.) 437; *Hunt v. Searcy*, 167 Mo. 158; *Evans v. Johnson*, 23 L. R. A. 737. (4) The trial judge, sitting as a chancellor in equity, erred in holding that plaintiff is not entitled to recover “in this form of action.” *Houtz v.*

Hellman, 228 Mo. 635. (5) If the trial judge was correct in holding that the form of action of the plaintiff is defective and illegal, then, the trial judge should have dismissed the plaintiff's suit, only—should not have rendered judgment against the plaintiff on the merits. *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542; *Barnett v. Smart*, 158 Mo. 167; *Lacassagne v. Chapuis*, 144 U. S. 119.

J. W. Peery and A. G. Knight for respondents.

(1) In *Hunt v. Searcy*, 167 Mo. 158, the court held Sec. 476, R. S. 1909, to be unconstitutional, but said case fails to recognize fundamental principles later recognized by this court in *State ex rel. v. McQuillin*, 151 S. W. 446; *Whittelsey v. Conniff*, 266 Mo. 567; *State ex rel. Paxton v. Guinotte*, 257 Mo. 1, and previously recognized by this court in *Dutcher v. Hill*, 29 Mo. 271; In the Matter of *Marquis*, 85 Mo. 615; In the Matter of *Crouse*, 140 Mo. App. 545. Secs. 482, 519 and 520, R. S. 1909, constitute a scheme and mode of procedure for the adjudication of insanity that is perfectly constitutional. This scheme has existed in the statute laws of this State from our admission into the Union to the present hour. This scheme in fact copies after and is closely analogous to the procedure of the common law. From the days of the Great Charter until the Lunacy Regulation Act of 1853, notice of an inquisition was not necessary, and it is within the competency of a State, by its legislation, to dispense with the same, providing the unfortunate may at any time demand and receive a trial under some provision of the statute. The decrees of probate courts adjudging persons to be of unsound mind, are not like ordinary judgments. They are not final, and are not to be treated as final judgments. They remain *in fieri*, like a cause pending, and may be reopened and set aside at any subsequent term of the court, whenever the insane person shall be restored to his right mind. The fundamental errors in

Hunt v. Searcy consist in treating these judgments and applying the same rules and tests to them as are applied to ordinary judgments. 10 Am. & Eng. Ency. Law 287; 3 Words & Phrases, 2227. The term "due process of law" is almost universally held to be synonymous with "law of the land" and is therefore lineally descended from Magna Charta. 3 Words & Phrases, 2228; 10 Am. & Eng. Ency. Law 290; 8 Cyc. 1083; Minor v. Happersett, 21 Wall. (U. S.) 162; Weimer v. Bunbury, 30 Mich. 201; Wulzen v. San Francisco, 101 Cal. 15, 40 Am. St. 17; Minor v. Happersett, 21 Wall. 162; Ballard v. Hunter, 204 U. S. 241; Attorney General v. Jochim, 99 Mich. 358, 41 Am. St. 606. "Formerly, under the English practice in lunacy, the proceedings upon the writ *de lunatico inquirendo* were *ex parte*, the alleged lunatic not being entitled as of right to notice thereof, since the proceedings were had for the information of the court, which might refuse to issue a commission, or might supersede a commission once issued, so that the right of the party to have the question of his insanity passed upon by a jury of the country in a court of law was to be exercised, if at all, upon a traverse of the inquisition. Although the party's right to traverse the finding of the inquisition appears to have been doubted or reluctantly admitted in some of the earlier cases, it was clearly established in the leading case of Cumming *in re* in which St Leonards, C., reviews the authorities in an elaborate opinion." 1 De G. M. & G. 537; 21 L. J. (N. S.) ch. 753; Jur. 483; Bridge, *in re*, Cr. & Ph. 338; Cumming, *in re*, the Chancellor St. 2 & 3 Edw. VI., ch. 8, sec. 6 (See also remarks of ELDON, C., in Ward *ex parte*, 6 Ves. 579; Staunton on the King's Prerogative, cap. 20, Traverse, p. 68.); Fust *in re*, 1 Cox 418; Wragg *at ex parte*, Ferne *ex parte*, 5 Ves. 450, 832; Sherwood v. Sanderson, 19 Ves. 280; Neville *in re*, Crawf. & Dix. Abr. Notes 55; Bridge, *in re*, Cr. & Ph. 338. This continued to be the settled law of England until the enactment of the Lunacy Regulation Act in 1853, which provided for

notice to the alleged incompetent, if he resided in the jurisdiction of the court, and which limited the absolute right of traverse to a period of three months after the finding of the inquisition. 16 & 17 Vic., ch. 70, secs. 148, 149; Buswell on Insanity, sec. 71; Woerner on Guardianship, 391; 22 Cyc. 1124, 1131; 10 Pl. & Prac. 1202. It therefore clearly appears that by the common law of England, prior to the Lunacy Regulation Act of 1853, inquisitions of insanity were regarded purely as proceedings *ex parte*; that notice to the alleged incompetent, though sometimes given, was never required, and that the findings of such inquisitions were never conclusive upon him, but were always open to attack. Buswell on Insanity, p. 33, sec. 23; Woerner on Guardianship, p. 382. It must be conceded, therefore, that if the subject of an inquisition of insanity ever had an absolute statutory right to notice of the proceedings, that right must be derived from the provisions of the Statute of 1835, requiring that he be brought before the court. In *Hunt v. Searcy*, 167 Mo. l. c. 177, MARSHALL, J., appears to have been of the opinion that a compliance with this provision of the statute would have been the legal equivalent of notice; but this view involves a fundamental misconception of the purpose and effect of the statute. It is inconceivable that the presence of a party under compulsion could ever be held a legal substitute for notice, where notice is required. So far from it being equivalent to notice, compulsory attendance may well be calculated to defeat the very purpose for which notice should be given. Woerner on Guardianship, 400; Whitenack in re, 3 N. J. Eq. 252; *Morton v. Sims* 64 Ga. 298. Inquisition of insanity is primarily an *ex parte* proceeding. The commission and jury might require the attendance of the subject of the inquiry and he might appear voluntarily, but in neither event did his presence make the finding of the inquisition conclusive upon him. His right to traverse the finding is in no way affected by the question of notice, or of his pres-

ence at the proceeding. When his attendance was required, it was rather in the capacity of a witness than as a party to the suit. His presence was regarded merely as an instrument of evidence by which the fact in issue might most properly be established. In fact, in some instances the question of sanity was formerly determined by inspection alone. 2 Cooley's Blackstone (3 Ed.), p. 331. This being the state of the law at the time of the enactment of Section 2, page 323, R. S. 1835, it is clear that the provision with respect to compulsory attendance of the subject of the inquiry could never have been intended as a substitute for, or as the equivalent of notice. It follows, therefore, that neither by the common law nor by statute has an alleged insane person ever had an absolute right to notice of the inquisition. Nor did he have any constitutional right to such notice. *Weimer v. Bunbury*, 30 Mich. 201; *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751; 10 Am. & Eng. Ency. Law, p. 295; *Eames v. Savage*, 52 Am. Rep. 752; *Ex Parte Marmaduke*, 91 Mo. 228; *Humes v. Railroad*, 82 Mo. 221; *Railroad v. Humes*, 115 U. S. 512; *Railroad v. Evans*, 85 Mo. 307; *State v. Schenk*, 238 Mo. 429; *State ex rel. Kiel v. Riechmann*, 239 Mo. 81. "These cases indicate that personal notice to the alleged lunatic is not regarded as a jurisdictional necessity in England. This accords with the statement of Shelford in his *Work on Lunacy* that in ordinary cases notice is not given to the party 'inasmuch as such proceedings are *ex parte* and not conclusive.'" *Evans v. Johnson*, 23 L. R. A. (W. Va.) 737, *Ex Parte Cranmer*, 12 Ves. Jr. 445; *Ex Parte Southcot*, 2 Ves. Sr. 401; *Ex Parte Hall*, 7 Ves. Jr. 261; *Re Lanwarne*, 46 L. T. N. S. 668; *Buswell on Insanity*, secs. 54, 71, 72; *Woerner's American Law of Guardianship*, sec. 119; *Bumpus v. French*, 60 N. E. (Mass.) 414; *In re Dowdell*, 47 N. E. (Mass.) l. c. 1033; *Ex parte Dagley*, 128 Pac. (Okla.) 699; *In re Crosswell*, 28 R. I. 137, 13 Am. & Eng. Anno. Cas. 874; *Ex parte Scudamore*, 46 So. (Fla.) 279; *Sporza v. Ger. Sav. Bank*, 192 N. Y. 8;

Shanklin v. Boyce.

People ex rel. Peabody v. Chanler, 117 N. Y. Supp. 322; McNamara v. Casserly, 61 Minn. 335, 343; Henning v. Stead, 138 Mo. 430; City of Kansas v. Huling, 87 Mo. 203; Newark & S. O. H. R. Co. v. Hunt, 12 Atl. 697; Miller v. Horton, 152 Mass. 540, 10 L. R. A. 116, 23 Am. St. 850; In re James, 30 How. Pr. 446; Ex Parte Brown, 1 L. R. A. (N. S.) 540; Embree v. K. C. Liberty Blvd. Rd. Dist., 166 S. W. 282; Shively v. Lankford, 174 Mo. 535; Marshall v. Standard, 24 Mo. App. 192, 196, 197. The constitutional provisions invoked in this case are not applicable to insanity cases, and the statutory provisions that notice may be dispensed with, has been expressly held constitutional. Chavannes v. Priestley, 80 Iowa, 316, 9 L. R. A. 19. The foregoing has received the tacit consent of Bumpus v. French, 60 N. E. 414; In re Dowdell, 47 N. E. 1033; approved in Woerner on Guardianship, 392, and Dutcher v. Hill, 29 Mo. 271; State ex rel. v. McQuillin, 151 S. W. 444; Same case, 171 Mo. App. 106; State ex rel. Paxton v. Guinotte, 257 Mo. 1; Whittelsey v. Conniff, 266 Mo. 561. The plaintiff by going into the probate court, submitting himself to its jurisdiction and having himself restored and adjudged sane, thereby acknowledged and ratified the proceedings of such court in adjudging him insane and appointing his guardian, and is therefore estopped from urging any irregularities in such proceedings. Dutcher v. Hill, 29 Mo. 274; Howard v. Lansbergs Committee, 60 S. E. (Va.) 769; Packard v. Ulrich, 67 Atl. (Md.) 246; Robertson v. Smith, 15 L. R. A. 273; In Re Blewitt, 30 N. E. (N. Y.) 587; Corbett v. Physicians' Casualty Assn. of American 115 N. W. (Wis.) 265, 16 L. R. A. (N. S.) 177; Nanson v. Jacob, 93 Mo. 344; Fischer v. Siekmann, 125 Mo. 165; Pockman v. Meatt, 49 Mo. 345; Boogher v. Frazier, 99 Mo. 325; Proctor v. Nance, 220 Mo. 104; Hector v. Mann, 225 Mo. 244. If the plaintiff could come into a court of equity and plead that on the 11th day of March, 1896, he was by a judge of the probate court of Grundy County, Missouri, adjudged insane and a guardian appointed over him, and that he had no

notice thereof, and that his property in consequence thereof had been taken from him and his liberty restrained, when in truth and in fact he was not insane, then a case would be presented appealing to the equitable powers of the court, showing an injury and wrong—a case for equitable jurisdiction. But, instead of this, the plaintiff comes into a court of equity asking relief against a judgment adjudging him insane, and at the same time in his petition alleging that as a matter of fact he was insane. His pleading, at most, shows but a technical violation of his legal rights, but instead of accompanying such allegation with the further jurisdictional clause, that the act complained of was contrary to equity, and that he had suffered injury thereby, the allegation is to the contrary thereof—that he was actually insane, and affirmatively shows that he could not have sustained injury. In other words, these allegations and the presence of the facts they allege, to-wit, that Shanklin was at all times mentioned actually insane, make the pleadings as well as the facts of the case, fail for the “want of equity.” The bill must show that plaintiff has sustained or will sustain some substantial injury, by reason of the facts complained of, and not by general averment, but by specific facts. 16 Cyc. 235, par 6; Willingham v. King, 23 Fla. 478; Kearney v. Andrews, 10 N. J. Eq. 70; Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black 545, 17 L. Ed. 333; Williams v. Hagood, 8 Otto, 72, 25 L. Ed. 51; Stille v. Hess, 112 Mich. 678, 71 N. W. 513. If the want of notice rendered the proceedings void, or the form of the sale rendered them void, as contended for by plaintiff, and that such proceedings may be attacked collaterally, as contended for by plaintiff, then plaintiff had a plain, adequate and complete remedy at law, and a common law action in equity to remove a cloud upon title, is not maintainable. Benton Co. v. Morgan, 163 Mo. 661; Planet Property & Finan. Co. v. Railroad, 115 Mo. 619; Walker v. Railroad 57 Mo. 275; Han. & St. Joe. Railroad Co. v. Nortoni, 154 Mo. 142; McKee v.

Shanklin v. Boyce.

Allen, 204 Mo. 655; Groc. Co. v. Clark's Exrx., 79 Mo. App. 405; Church v. Church, 73 Mo. App. 421; Glaves v. Wood, 87 Mo. App. 92; Humphreys v. Atlantic Mill. Co., 98 Mo. 548; Railroad v. Reynolds, 89 Mo. 146; Christian v. City, 127 Mo. 109; Stockton v. Ranson, 60 Mo. 539; Michael v. City, 112 Mo. 614; Russell v. Lumber Co., 112 Mo. 40; Faris v. Moore, 256 Mo. 129; Fontaine v. Hudson, 93 Mo. 62; Graves v. Ewart, 99 Mo. 13; Captain v. Miss. Valley Trust Co., 177 S. W. 632; Neil v. Tubb, 241 Mo. 674; Weston v. Fisher, 180 S. W. 1039. Berry, the guardian who made the guardian's deed, and which deed is sought to be cancelled by plaintiff, not having been made a party to the suit, and not being before the court, the court will be without authority to cancel the deed from him to defendant. Dunklin Co. v. Clark, 51 Mo. 60; Clark v. Covenant Mut. Life Ins. Co., 52 Mo. 272; Han. & St. Joe. R. R. Co. v. Nortoni, 154 Mo. 142. Judge Scott said as long ago as 1860, and whose words have not been doubted in any subsequent decision, on that question, that "After considerable examination, we have not been able to find a single case in which it has been held that the validity of a sale of land of a supposed lunatic, made by his guardian. can be attacked in a collateral proceeding on the ground of the want of notice of taking the inquisition by which the supposed lunatic was found to be such." Dutcher v. Hill, 29 Mo. 273; Freeman v. Thompson, 53 Mo. 193; Johnson v. Beazley, 65 Mo. 250; Henry v. McKerlie, 78 Mo. 416; Noland v. Barrett, 122 Mo. 181; Brawford v. Wolfe, 103 Mo. 391. Long v. Mining Co., 68 Mo. 433; Blickensderffer v. Hanna, 231 Mo. 93; Cox v. Boyce, et. al., 152 Mo. 583; Higbee v. Bank, 244 Mo. 411; Decker v. Fessler, 146 Ind. 16.

BOND, P. J.—1. In January, 1911, the plaintiff filed his amended petition, making Richard E. Boyce and Grundy County, Missouri, defendants, alleging that he became insane on November 26, 1895, and remained in

Statement. that condition until July 15, 1910, when his reason and understanding were fully restored: that at the time of his becoming insane he owned certain real estate described in his petition; that on December 28, 1896, one C. L. Berry, assuming to be the guardian of the person and estate of the plaintiff, unlawfully and fraudulently took possession of said property and attempted to sell and convey the same to Richard E. Boyce, for the purported consideration of \$18,000, and made and delivered to said Boyce a guardian's deed to said property, now of record in the Recorder's office of Grundy County; that the grantee took possession of the property and continued so to hold the same in fraud of plaintiff's rights; that said grantee, on March 6, 1917, borrowed certain county funds to the amount of \$4,000, and executed a mortgage to secure the same, with full knowledge on the part of both said Boyce and the parties making the loan, of the insane condition of plaintiff at that time; alleged that these transactions were clouds upon his title, which he prayed should be set aside and annulled, and that possession of said property should be restored to him, and for an accounting of rents and profits and a judgment therefor.

A demurrer was overruled and after answer and adduction of evidence the trial court rendered a judgment in favor of defendants, from which plaintiff has duly appealed.

II. Under the evidence in this case no question existed as to the fact and duration of the insanity of the plaintiff, nor as to the complete restoration of his faculties, as stated in his second amended petition.

Notice. Nor is it denied that the proceedings for the appointment of his guardian were had and conducted without any notice whatever to the plaintiff and without his personal presence in the probate court at the time of the alleged inquisition. That portion of Section 476, Revised Statutes 1909, which permits the appointment of a guardian or curator of insane per-

sons, without notice given to the alleged insane person, was held unconstitutional in *Hunt v. Searcy*, 167 Mo. 158, after a full review of the authorities in this State and a clear discussion of the terms of the statute and the constitutional rights of persons affected thereby. The able author of that opinion buttressed his conclusion upon elemental propositions of law as enunciated by the Supreme Court of the United States, and in applying the result of these deductions to the construction of said statute ("Section 476: In proceedings under this article, the alleged insane person must be notified of the proceeding unless the probate court order such person to be brought before the court, or spread upon its records of its proceedings the reason why such notice or attendance was not required" R. S. 1909.) Held that its alternative provisions for notice were void. The court then added;

"It is too clear for argument that this qualification and attempted authority for depriving the accused of his liberty or property without notice violates both the State and Federal Constitutions, and does not constitute 'due process of law.'

"But one reason can be suggested for not serving the person to be tried with notice, and that is, that as he is insane, a notice to him would be useless and meaningless. This argument begs the question; for the issue to be tried is whether he is insane or not, and to fail to give him notice, for this reason, is to forestall the very purpose of the inquest. But even if he be a raving maniac, he can appear by attorney or through his friends and see that a proper person is appointed guardian or that proper care is given to his property and to his person. In addition, what if the person was not really insane at all, and without notice was adjudged insane and confined in an asylum and the management of his property given to another? In such contingency the propriety of notice would be manifest and if given would defeat the recovery of a judgment. It will not do to say that in the fifty-seven years that these provisions, not requiring notice, have

been on the statute books, no instance is recorded of any sane person being so adjudged and deprived of his liberty or property, and that instances of such outrages are found only in highly-colored and improbable stories in works of fiction; for the Marquis case (85 Mo. 615) is an instance in our own reports where a citizen was so adjudged insane, without notice, and at the very next term of court appeared and proved that he was not and never was insane. But however the past experience may have been, the fact remains that the possibility of such an outrage being perpetrated is afforded by the statutory provisions referred to, and it is the duty of the courts, whenever the question arises, to prevent the happening of such a wrong, by declaring those provisions to be unconstitutional." [167 Mo. l. c. 182-3.]

We are contented with the conclusion expressed in *Hunt v. Searcy* and adhere to the reasoning of that case, despite the fact of the decisions in other jurisdictions of a contrary nature quoted in the brief of respondent.

It follows that the appointment of Berry as guardian of plaintiff was void and vested him with no title to the property beclouded by his deed to defendants.

III. As it was necessary in this case to resort to evidence of extrinsic facts, in order to show that the deeds purporting to convey plaintiff's property were void, and that the appointment of the guardian **Equity.** was void, plaintiff is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. *Thompson v. Pinnell*, 237 Mo. l. c. 552, et cases cited.]

The judgment in this case is reversed and the cause remanded to be proceeded with in a manner not inconsistent with the views herein expressed. All concur.

EMMA D. BELL et al, v. ED. GEORGE, Appellant.

Division One, June 4, 1918.

1. **EVIDENCE: Champerty: Concealed Interest in Suit: Compulsory Testimony.** It is not prejudicial error to refuse to compel the attorney of record for plaintiffs to testify whether he has a deed from plaintiffs to the lands in suit, or a contract with them whereby he is to receive an interest in the land in case judgment is rendered in their favor, for he is just as much concluded by a judgment against them as he would be had he been joined as a party.
2. **LACHES: Divesting Title: Failure to Pay Taxes.** In an action at law to determine title to land, in which no affirmative equitable relief is asked, plaintiffs cannot be divested of their title based on a patent from the Government, on the equitable doctrine relating to laches, merely because neither they nor their ancestor, the said patentee, had paid any taxes on said land at any time during the fifty-six intervening years since the patent was issued.
3. **PAYMENT OF TAXES: By Whom: No Showing: Presumption.** In the absence of evidence on the subject, the court has a right to presume that the record owner of the land paid the taxes from the time the patent was issued in 1859 up until it was sold for the taxes of 1889, although such record owner is not shown to have been at any time in actual possession. The burden is upon the purchaser at the tax sale to show that the record owner had not paid the taxes prior to his purchase.
4. **PLAT BOOK: Uncertified: Relied On to Show Owner of Land.** An uncertified plat book, purporting to have been made by the proper United States land office, is not competent evidence for any purpose; and, although such plat book shows the lands were entered by a certain person in 1857, and the patents, which were not recorded in the county where the lands are situate, show they were issued to the assignee of said entryman in 1859, the Collector of the Revenue is not authorized to rely upon such uncertified plat book in ascertaining the owner of the land, where the statute requires the suit to be brought against the owner of the land.
5. **—: Ancient Document.** An uncertified plat book, which does not purport to be the original, is not competent evidence as an ancient document.

Bell v. George.

6. **PATENT: Notice: Recorded in County.** It is not necessary that the patent, which named a certain person as patentee and described him as the assignee of certain military bounty warrants, should be recorded in the county where the land lies, in order to impart notice to the tax collector that such patentee or his heirs are the owners of the land. The Act of Congress required the patents to be recorded in the General Land Office, and when so recorded they imparted notice to the tax collector that the said certificate holder had assigned his land warrants to the patentee.

Appeal from Butler Circuit Court—*Hon. J. P. Foard*,
Judge.

AFFIRMED.

Lew R. Thomason for appellant.

(1) The trial court erred in refusing to permit the defendant to show that J. William Chilton was the real party in interest and owner of the lands by an unrecorded deed or contract with the nominal plaintiffs. Every cause shall be prosecuted in the name of the real party. Sec. 1728, R. S. 1909. If J. W. Chilton had succeeded to the claims of the plaintiffs, either by deed or by valid contract, he was the proper party to sue as plaintiff, and it can make no difference whether it would change, strengthen or weaken the defense in this action. Sec. 1729, R. S. 1909; *Citizen's Bank v. Burroughs*, 178 Mo. 731. Where the answer of the defendant denies that plaintiffs are the real parties in interest such averments are issuable allegations and it is error for the trial court to exclude evidence offered in support of such allegations. *Nansen v. Jacobs*, 93 Mo. 346. (2) One of the issues tendered by the defendant in his answer was that whatever claim, if any, the plaintiffs had to the lands in controversy, had long since been abandoned, and that plaintiffs had been guilty of the grossest laches. By the uncontroverted evidence it is shown that the plaintiffs' ancestor obtained title to the lands in question on the first day of November, 1859, and that

neither of the plaintiffs, the youngest of whom at the time of the trial was shown to be more than thirty-nine years of age, or their ancestor, had ever been in possession of the lands, or any part thereof, or had ever asserted any claim of, interest in and to said lands or any part thereof, until the institution of this suit, and for more than fifty-six years after obtaining their claim of title. "Laches" is defined to be an unreasonable delay; neglect to do a thing or seek to enforce the right at a proper time. Bouvier's Law Dictionary (3 Ed.), p. 1820; Anderson v. Northrup, 30 Fla. 612. The doctrine of laches is based upon ground of public policy which requires there be peace of society and the discouragement of all stale claims. Mackall v. Casilear, 137 U. S. 556. Naddo v. Bardon, 51 Fed. 498; Shelton v. Horrell, 232 Mo. 376. Turner v. Burk, 81 Ark. 352. The doctrine of laches will prevent the enforcement of a stale claim no matter whether predicated upon a legal or equitable right. State ex rel. v. Reynolds, 243 Mo. 720; Heating Company v. Consolidated Car Heating Co., 174 Fed. 658. Laches though an equitable defense may be joined in the same answer as a general denial. Ledbetter v. Ledbetter, 88 Mo. 60; Munford v. Keet, 154 Mo. 48; Fisher v. Stevens, 143 Mo. 181. (3) The statute to enforce the lien for delinquent taxes upon the lands, provided that: "all actions shall be prosecuted against the owner of the property, if known, and if not known, against the last owner as shown by the records of the county or city at the time the suit was brought." The tax suit under which the defendant claims title was in strict harmony with the provisions of the above statute. It was brought against Amzi Rudolph, the last record owner as shown by the land records of Butler County. In ascertaining the record owner for the purpose of bringing a suit for delinquent taxes, the collector is not confined to the records of deeds as recorded but may look to the plat book. Payne v. Lot, 90 Mo. 676; Noland v. Taylor, 131 Mo. 224; Allen v. Ray, 96 Mo. 542. There is nothing in the statute requiring said plat book to be

certified in any manner or form; the statute only requires that it be obtained from the land offices of the respective district of the county. Sec. 11363, R. S. 1909. An ancient instrument is presumed to be genuine and is admissible in evidence without further proof. Where an instrument is more than thirty years old and is unblemished by alterations the bare production thereof is sufficient to entitle it to admission in evidence. *Wynn v. Patterson*, 9th Peters (U. S.) 674; *Bank of U. S. v. Dandridge*, 12 Wheat (U. S.) 70; *First Greenleaf on Evidence*, sec. 141; *Jackson v. Blanshan*, 3 Am. Dec. 485; *Crane v. Marshall*, 33 Am. Dec. 631; *Dodge v. Briggs*, 27 Fed. 170; *Hodge v. Hub*, 94 Mo. 489; *Wilson v. Snow*, 228 U. S. 217. The date of the instrument at the date of the trial determines its admissibility. *Gordon v. Graniss*, 56 Ga. 539. The plat book offered by the defendant, though uncertified, was the proper record for the Collector of Revenue to consult for the purpose of ascertaining the last record owner of the lands in controversy, for the purpose of recovering the delinquent taxes thereon, and was admissible in evidence. *Payne v. Lot*, 90 Mo. 676; *Noland v. Taylor*, 131 Mo. 224; *Lond v. Doud*, 87 Mo. 197; *Kansas City v. Scarritt*, 169 Mo. 471. The tax suit against Amzi Rudolph, being in full compliance with the law, the sale of the lands as a result thereof passed the title.

J. W. Chilton for respondents.

(1) Respondent's title being a legal title, laches could not be pleaded or urged as a defense thereto. *Workman v. Moon*, 177 S. W. 862; *Chilton v. Nickey*, 261 Mo. 232; *Hays v. Schall*, 229 Mo. 124; *Wilcox v. Moore*, 196 S. W. 15; *Wilcox v. Moore*, 199 S. W. 135; *Wengler v. McComb*, 188 S. W. 76; *Meyers v. DeLisle*, 259 Mo. 506; *Russ v. Hope*, 265 Mo. 637. (2) The non-payment of taxes by the owner of land for any length of time whatever, will not of itself bar the owner's title. Actual possession by an adverse claimant is an indispensable pre-requisite to the starting of any

Bell v. George.

Statute of Limitations, or to a plea of equitable estoppel or laches. *Burkham v. Mannewall*, 195 Mo. 506; *Haarstick v. Gabriel*, 200 Mo. 237; *Hays v. Pumphrey*, 226 Mo. 119. (3) Payment of taxes, surveying land, cutting timber therefrom and keeping other trespassers off by one who holds mere color of title to land are not such acts as constitute actual possession of the land, and not such acts as will set in motion any Statute of Limitations or sustain a plea of equitable estoppel as against the true owner. *Chilton v. Nickey*, 261 Mo. 232; *Himmelberger Harrison Lbr. Co. v. McCabe*, 220 Mo. 154; *Stone v. Perkins*, 217 Mo. 602; *Chilton v. Comanianni*, 221 Mo. 685; *Pharis v. Jones*, 122 Mo. 125; *Nye v. McAlfter*, 127 Mo. 529. (4) Section 9303, R. S. 1899, required suits for back taxes to be brought against the owner of the land. In construing said statute this court has held that it is sufficient ordinarily to sue one whom the public records disclose to be the owner. But there is nowhere in the law any authority justifying a Collector to resort to an uncertified plat book for the names of owners. Unless a plat book is certified it is not a public record; it is nothing. And it is not admissible in evidence for any purpose. *Bell v. Ham*, 188 Mo. App. 71; *Stewart v. Lead Belt Co.*, 200 Mo. 281. (5) The purported plat book was not an ancient document within the meaning of the law; the ancient document rule does not apply to mere copies of records. *Byrd v. Phillips*, 111 S. W. 1109, *McClerry v. Lewis*, 70 Atl. 540. (6) Land patents issued by the United States are not required to be recorded upon the deed records of the county in which the land lies. Chap. 30, R. S. 1909, applies only to instruments "which have been acknowledged or proved according to law." The Chapter on Records of Deeds (Sections 10390-10391) simply permits the record of patents by making it the duty of the recorder to record such patents as may be offered to him for that purpose. Secs. 2787-2809, Chap. 30, R. S. 1909; *Webb on Record of Title*, sec. 25, page 59; *Wilcox v. Phillips*, 260 Mo. 664; *Mosher v. Bacon*, 229 Mo. 338; *Bell v. Ham*, 188 Mo. App. 71;

Nichols v. Hobbs, 197 S. W. 258; United States v. Schurz, 102 U. S. 378; 2 Jones on Real Property, secs. 1377-1728; Wolf v. Brown, 142 Mo. 617. (7) The rule of equitable estoppel cannot be invoked in this action because appellant was never in the actual possession of the land, never improved it or expended any money on it, and his position has suffered no change for the worse by reason of respondents' failure to quiet their title at an earlier date. Robbing the land of its timber certainly did not improve it. Workman v. Moon, 177 S. W. 862; Meyers v. DeLisle, 259 Mo. 512; Marshall v. Hill, 246 Mo. 1; Collier v. Gault, 234 Mo. 465; Williams v. Sands, 251 Mo. 147. (8) The plea of an outstanding title in a third party cannot be invoked as a defense to plaintiff's action to quiet title where plaintiff and defendant claim under a common source, if it be not shown that defendant has acquired the title of such third person. Skillman v. Clardy, 256 Mo. 322; Dixon v. Hunter, 204 Mo. 390. (9) And where a defendant shows no title in himself, he is not concerned with an adjudication of the rights or titles as between the plaintiff and any third party. Authorities above.

RAILEY, C.—This action was commenced in the circuit court of Butler County, Missouri, on February 20, 1915, to quiet title to the southeast quarter and lot 1 of the southwest quarter of section 19, and the northeast quarter of section 30, all in township 26, range 7 east, situate in said county.

It is averred in the petition that plaintiffs own and claim to have title in fee simple to the real estate aforesaid; that defendant makes some claim of title, estate or interest in said land, which is adverse and prejudicial to the estate and title of plaintiffs therein. A decree was then asked, quieting title in them, etc. The petition also alleges that if the court should find "that defendant, since the year 1903, purchased said lands, or any part thereof, at a void tax sale, and

Bell v. George.

thereafter in good faith paid taxes thereon, under claim of ownership of said lands, whereby plaintiffs are liable to re-imburse defendant for taxes so paid on said lands, the plaintiffs now offer, and tender to pay such taxes, with six per cent interest thereon, as soon as they may be found and adjudged by the court."

Defendant, Ed. George, filed an answer, admitting that he claims title to the lands aforesaid. He further alleges that whatever claims, if any, the plaintiffs may have in or to said lands have long since been abandoned by them; that neither plaintiffs, nor those under whom they claim, have ever been in possession of said lands, nor have they or either of them ever paid any State, county or other tax assessed against said lands, nor have they ever exercised any acts of ownership over said lands, nor have they ever asserted any claim or right of title to said lands until the institution of this suit. He alleges that plaintiffs have been guilty of such gross laches as to debar and preclude them from asserting any right, title, claim or interest in said lands, either at law or in equity; "that defendant has paid all taxes on said land and exercised such acts of ownership of which as said lands were susceptible."

The answer further alleges that plaintiffs are not the real parties in interest in this action, but that said action is prosecuted in their names by one J. William Chilton, who is the real party in interest; that he is prosecuting said action under an unrecorded deed conveying to him an interest in said lands, equal to or greater than one-half thereof, or by virtue of a contract, whereby, if successful, he shall receive a part of said lands as compensation, and be responsible for the costs of this action, the plaintiffs being non-residents of Missouri; that said action was instituted and is being prosecuted under said champertous contract. He further denies, in said answer, each and every allegation of the petition, except that he claims title to said lands.

Defendant, further answering, by way of cross-bill, alleges that he is the owner and claims title to the lands aforesaid; that plaintiffs claim some title, estate

or interest in the above lands which is adverse and prejudicial to the estate, title and interest of this defendant. Wherefore, defendant prays the court to ascertain and determine the estate, title and interest of the defendant, and of the plaintiffs respectively, in and to said lands, and by its decree to adjudge, determine, define and quiet the title of this defendant in said lands. He also prays, that plaintiffs be, by the order, judgment and decree of the court, forever barred and precluded from asserting any right, title, claim or interest in and to said lands, or any part thereof; and for all such other and further relief to which defendant may be entitled.

The case was tried without a jury on February 3, 1915, and taken under advisement by the court.

PLAINTIFFS' EVIDENCE.

The respondents introduced in evidence a certified copy of the patent issued by the United States to William B. Dorn, dated November 1, 1859, and recorded in Butler County, Missouri, November 20, 1912. As set out in the record, it reads as follows:

"United States of America, to all whom these present shall come, greeting: Whereas, in pursuance of an act of Congress, approved March 3, 1855, entitled an act giving bounty lands to officers and soldiers having been engaged in military service of the United States of America, there has been deposited in the General Land Office of the United States Warrant No. 29488 with evidence that the same has been duly located upon Lot One of the southwest quarter of section nineteen, township 26, north range seven east, Butler County, Missouri, in favor of Amzi Rudolph. The certificate of said location being duly assigned by said Amzi Rudolph to William B. Dorn; now know ye that there is therefore granted by the United States of America unto the said William B. Dorn, as assignee as aforesaid, and unto his heirs, the lands above described, to have and to hold forever, and which said patent

Bell v. George.

was duly executed by the President of the United States.”

Defendant objected to the introduction of the certified copy of said patent, as evidence, for the reason, that the lands described therein were entered by the said Amzi Rudolph, in the year 1857, under a military land warrant; that said entry by said Amzi Rudolph was of record in the offices of the Recorder of Deeds for the county of Butler and State of Missouri; that said Rudolph permitted the taxes on said lands to become delinquent and unpaid for many years; that suit was commenced by the Collector of Revenue of said county against said Rudolph, as the record owner of said lands, as shown by said records; that he was the proper party to sue for said taxes under the laws of Missouri; that judgment was rendered against him for non-payment of said delinquent taxes; that said lands were sold, and the title thereto passed by said sale; that the unrecorded patent to said William B. Dorn, as assignee, is insufficient to affect or destroy the validity of said sale; that by virtue of said sale, plaintiffs have neither the legal nor equitable title to said lands. This objection was overruled.

Plaintiffs next offered in evidence a certified copy of United States patent to Wm. B. Dorn, as assignee of said Rudolph, dated November 1, 1859, and recorded November 20, 1912, conveying the west half of the southeast quarter of section 19, township 26 north, range 7 east, in said county. Same objection was made and overruled.

Plaintiffs next introduced in evidence a certified copy of United States patent to said Dorn, as assignee of said Rudolph, dated November 1, 1859, and recorded in said county November 20, 1912, conveying lot 1 of the northwest quarter and the southwest quarter of the northeast quarter of section 30, township 26 north, range 7 east, in said county. Same objection was made and overruled.

Plaintiffs next introduced in evidence, a United States patent to said Dorn, as assignee of said Rudolph,

dated November 1, 1859, and recorded in said county, November 20, 1912, conveying the east half of the north-east quarter and the northwest quarter of the north-east quarter of section 30, township and range aforesaid, located in Butler County, Missouri. Same objection was made and overruled.

Plaintiffs next offered in evidence the deposition of Erma D. Bell. Witness testified that her mother, Mattie G. Felton, is still alive, and married J. R. Felton in 1886; that her father, William B. Dorn, died in South Carolina, in December, 1876, at the age of seventy-eight years; that the other plaintiffs herein are the heirs at law of said Wm. B. Dorn.

Plaintiffs also introduced in evidence a certified copy of the will of Wm. B. Dorn, which Division Two of this court held invalid in Bell v. Smith, 271 Mo. 619. In the will, testator attempted to give his wife a life estate in said lands, with remainder to his heirs. The will was objected to by defendant and his objection overruled.

“Thereupon it is admitted that said lands are not now, nor have they ever been, in the actual possession of any person or persons.”

DEFENDANT'S EVIDENCE.

E. R. Lentz, a witness for defendant, testified: That he was a practicing lawyer, and had been engaged in the real estate business in Butler County, Missouri, since 1878; that he had frequently examined the plat book on file in the office of the Recorder of Deeds of above county; that the book shown him is the above plat book, and it has been generally used as one of the public records of Butler County since 1878; that he examined it in 1878; that when he first examined the book it was in the custody of the Circuit Clerk, who was *ex officio* recorder; that since the separation of said offices, it has been in the Recorder's office; that he was told by the Circuit Clerk and Recorder that it had been obtained from the Registrar of the Land

Bell v. George.

Office at Ironton, Missouri, some time in the later sixties; that he has always found it correct.

Defendant then offered in evidence, over the objection of plaintiffs, the above plat book, for the purpose of showing that all the lands in controversy were entered by Amzi Rudolph, under military land warrants, in the year 1857.

Defendant next offered in evidence, over the objection of plaintiffs, a certificate signed by J. H. Duncan, Registrar of the United States Land Office at Springfield, Missouri, with the seal affixed, showing that all the lands described in plaintiffs' petition were entered by Amzi Rudolph on June 22, 1857, under military land warrants.

Defendant next offered in evidence, over the objection of plaintiffs, a sheriff's deed in proper form, duly executed, and purporting to convey all the land described in plaintiffs' petition dated November 5, 1889, acknowledged November 25, 1889, filed for record December 10, 1889, and which purported to convey all of the interest in said lands of Amzi Rudolph to Wm. Ferguson, as grantee.

"It is admitted by the plaintiffs herein, that the defendant Ed. George is the owner of mesne conveyance of any and all title which may have passed by the sheriff's deed, which the defendant has just introduced in evidence."

Ed. George testified that he claimed to own the lands in controversy; that he acquired deed to said lands in 1904 or 1905; that he has exercised such acts of ownership over said lands as they were susceptible of, that is, he paid the taxes thereon since 1905, and for two or three years back taxes; that he never knew of Wm. B. Dorn, or his heirs, claiming any interest in these lands until this suit was brought. On cross-examination, he testified that he did not mean to state that he had been in the *actual* possession of these lands, but has looked after them; that he has paid some one

all the time to protect them from trespassers; *that he had sold some of the timber from this land.*

J. William Chilton was sworn as a witness in behalf of defendant. He testified that he first saw Mrs. Bell in 1912, but never saw any of the other plaintiffs, with one exception; that he has had some correspondence, mostly with Mrs. Bell; that she wrote first. Witness was then asked if he had a deed to this land, conveying any interest therein to him. This was objected to by witness as a confidential matter, and the objection was sustained. He stated, however, that he had no contract by which he was to be responsible for the costs herein, if this suit was decided in favor of defendant.

The foregoing covered all the testimony in the case. No instructions were asked by either plaintiffs or defendant, nor were any given by the court of its own motion.

FINDINGS.

On July 5, 1915, the trial court decided the case, and made a finding of facts. It found that W. B. Dorn was the patentee of the lands in controversy; that said W. B. Dorn died in 1876; that Mattie G. Felton was his widow; that the other plaintiffs are his heirs as well as devisees, under the will aforesaid; that said Mattie G. Felton has a life estate in said lands and that the remaining plaintiffs are the owners in fee of the lands described in petition. The court further found that defendant Ed. George had no interest, estate or title to any part of said lands. A decree was entered in due form, in favor of said plaintiffs, in accordance with said findings.

Defendant in due time filed his motions for a new trial and in arrest of judgment. Both motions were overruled, and the cause duly appealed by him to this court.

I. It is contended by appellant that the trial court committed error in refusing to require J. William

**Undisclosed
Party.**

Chilton, counsel for plaintiffs, to testify as to whether or not he had a contract with plaintiffs, whereby he was to receive an interest in the land mentioned in the petition.

It is not necessary to determine in this case whether Mr. Chilton was within the law in declining to testify in respect to above matter, nor whether he was justified in declining to answer the questions propounded, by virtue of Section 6362, Revised Statutes 1909. He was counsel for plaintiffs in the trial court, and is the attorney of record for them here. He is just as much concluded by the judgment rendered in this cause, as though he had been joined as a party to the action. [Titus v. Development Co., 264 Mo. l. c. 246 and following; State ex rel. v. Stone, 269 Mo. l. c. 344 and cases cited.]

In the Titus case supra, plaintiff had defended an action in the name of his clients, where the title to real estate was involved, when he had in his possession at the time an unrecorded deed to said land. His clients were unsuccessful in the first suit, and thereupon, Titus brought a suit in ejectment for the same land, after having his deed recorded. On page 248, we said:

"It is apparent from the record that plaintiff was attempting, in the name of his grantors, to litigate his own title with the heirs of Edward A. Stevens behind a masked battery, and if unsuccessful, as he was in that litigation, to open up a new proceeding as an innocent purchaser for value, as he has attempted to do in this case. . . .

"We are satisfied, from the record, that plaintiff had the entire control and management of said cause in behalf of his grantors, and that every step taken therein was for his own benefit and in defense of his own title. We therefore conclude that on the facts presented here the plaintiff is as much bound by the decree in the above cause as he would have been had he been joined as a defendant in said action."

In State ex rel. v. Stone, 269 Mo. l. c. 344, we held that:

"Whenever a party is interested in the subject-matter of pending litigation, and is placed in the control and management of the defense therein, he is just as much bound by the judgment in the cause as the real defendant in whose name the defense is made."

The principle of law announced in both the above cases is amply supported by a number of authorities cited therein.

If we should conclude that the tax judgment is valid, and that the title to the land in controversy passed under the sheriff's tax deed, then defendant's title is good as against these plaintiffs, and would likewise be good as against J. William Chilton, even if he did have an unrecorded deed to all or any part of said land.

In view of the foregoing, defendant was not injured by the ruling of the court, whether right or wrong, in refusing to compel Chilton to answer the questions propounded to him.

II. It is claimed by appellant that he has acquired title to the lands in controversy, because of the alleged *laches* of plaintiffs and William B. Dorn in failing to pay any taxes thereon for fifty-six years.

This is purely an action at law, in which no affirmative equitable relief is asked by either plaintiffs or defendant. The respective claims of title are set out in the preceding statement. On the record thus made, the plaintiffs cannot be divested of their legal title by the application of the equitable doctrine relating to *laches*. [Charles P. Hunter et al. v. Louise C. Moore, decided by this Division, March 29, 1918; Wilcox v. Moore, 199 S. W. (Mo.) l. c. 136; Garrison v. Taff, 197 S. W. (Mo.) l. c. 274; Kellogg v. Moore, 196 S. W. (Mo.) 15; Chilton v. Nickey, 261 Mo. l. c. 243; Hayes v. Schall, 229 Mo. 114.]

III. While defendant asserts that neither Wm. B. Dorn nor plaintiffs have ever paid any taxes on this land in fifty-six years, this assertion is not sustained by the evidence. The tax deed relied upon **Payment of Taxes.** by defendant is dated November 5, 1889. He only claims to have paid the taxes after said date. This action was commenced on February 20, 1915. He failed to show that Amzi Rudolph had ever, at any time, paid any taxes, and as he assigned his land warrants to Wm. B. Dorn prior to November 1, 1859, it can hardly be assumed that Rudolph paid any of the taxes on the land after he assigned the warrants to Dorn. As Dorn was the record owner of the land until his death, and as plaintiffs became the record owners at his death, in the absence of evidence upon that subject, the trial court had the right to presume that the taxes, from November 1, 1859 to 1889, were paid by Dorn and plaintiffs. [Hunter et al. v. Moore, supra.] The burden of proof, upon this subject, devolved upon defendant, and he failed to successfully carry the burden.

In the Hunter-Moore case, supra, the plaintiffs were never in possession of the land, although they were the record owners thereof. It did not appear from the evidence, that they had ever, at any time, paid any taxes on the land. The defendant, Moore, under color of title, pleaded the thirty-one-year Statute of Limitations, and charged that neither the plaintiffs, nor their predecessors in title, had ever paid any taxes on said land, while she and those under whom she claimed had paid the taxes during said period. We held in the above case, that as the evidence did not show who had paid the taxes on said land for three or four years, out of the thirty years, it could not be presumed that plaintiffs and those under whom they claimed, as the record owners, had not paid them.

Even if defendant were relying upon the thirty-one year Statute of Limitations, the trial court was

justified on the record before us in finding against him in respect to above matter.

IV. Defendant testified: "I have never known of Wm. B. Dorn, or his heirs, claiming any interest in these lands until this suit was brought." He claims to have acquired his title in 1904 or 1905. There is nothing in the record to indicate that he had ever heard of plaintiffs, or William B. Dorn at that time, much less being misled by anything they said, did, or failed to do. The record fails to show how much defendant paid for the land; the amount of taxes he paid; the amount he claims to have paid for keeping trespassers off, and likewise fails to show how much timber he confessedly sold off the land. It is not surprising that the trial court failed to recognize any plausible grounds for the application of the equitable doctrine relating to laches. The trial court was well within the law, in holding that there is no merit in the above contention of appellant.

**Knowledge
of Record
Owner.**

V. It is admitted that the plat book heretofore mentioned shows that Amzi Rudolph, in 1857, entered the lands in controversy. It is also admitted that said plat book is not certified as correct by any officer of the United States Land Office. It was offered in evidence by defendant, and objected to by respondents, on the ground that it was not a plat book within the meaning of the law. Said objection was overruled, an exception saved, and the plat considered as evidence.

**Plat
Book.**

The patents to the lands in controversy issued to William B. Dorn are dated November 1, 1859, and recite on their face that Amzi Rudolph assigned the land warrants issued to him, for said land, to Wm. B. Dorn. The tax suit brought in 1889, through which defendant claims title, was against said Amzi Rudolph, and not against these plaintiffs. William B. Dorn having died in 1876, these plaintiffs were the record owners of said land, when the tax suit was brought in

Bell v. George.

1889. Section 7682, Revised Statutes 1889, which was carried into Revised Statutes 1899, as Section 9303, in express terms required that the tax suit, under which defendant claims title, should be brought against the owner of the land.

Notwithstanding the plain requirement of Section 7682 that the tax suit should be brought against the owner of the property, it is insisted by appellant, that the tax collector had the right to rely on the plat heretofore mentioned, as the patents were not recorded in Butler County, Missouri, in determining who was the owner of said lands; and that the tax proceeding was properly prosecuted against Amzi Rudolph, who was shown by said plat to be the party who had entered these lands in 1857.

We will now proceed to a consideration of defendant's contention, in respect to above matter.

VI. Was the plat heretofore mentioned, and offered in evidence by appellant, competent for any purpose, without having been properly certified?

Section 6290, Revised Statutes 1909, provides, that:
"Copies of any entry or entries, or memoranda, made on the books of the office of any register or receiver of any United States land office, certified by the said register or receiver to be correct, shall be received in evidence in the trial of any cause in any of the courts of this State." This section has been upon our statute books for more than sixty years. We construed the same in *Stewart v. Lead Belt Land Co.*, 200 Mo. l. c. 290, and held that an uncertified plat like the one in controversy should have been excluded as evidence. To same effect is *Bell v. Ham*, 188 Mo. App. l. c. 81.

We accordingly rule that the above plat was incompetent as evidence for any purpose and should have been excluded. The Collector, therefore, in determining who was the *owner* of said lands, was not justified in resorting to the plat for that purpose.

VII. Was said plat competent evidence as an ancient document, regardless of its age? It does not purport to be the original, and the law relating to the admission in evidence of ancient documents, **Ancient Document.** has no application to such an instrument. [Laclede Land & Imp. Co. v. Goodno, 181 S. W. (Mo.); l. c. 413; Stewart v. Lead Belt Land Co., 200 Mo. l. c. 290; McCleery v. Lewis, 104 Me. l. c. 37, 70 Atl. 540.]

VIII. Was it necessary that the patents issued to Wm. B. Dorn by the United States, on November 1, 1859, should have been recorded in Butler County, Missouri, to impart notice to the tax collector, that Dorn or his heirs were the owners of the land in controversy? Section 705, Volume 1, United States Compiled Statutes (1913), page 280, R. S. sec. 458, in express terms, provides that such patents shall be recorded in the land office at Washington, D. C. **Recording Patent.**

In *Organ v. Bunnell*, 184 S. W. l. c. 104, we said: "The patent aforesaid was not recorded in Dent County, but was duly recorded at the General Land Office in Washington, D. C., at the time it was issued in 1859. There is no provision in our statute which requires a patent from the United States to be recorded in the county where the land lies. [*Wilcox v. Phillips*, 260 Mo. l. c. 680, 169 S. W. 55; *Mosher v. Bacon*, 229 Mo. l. c. 358, 129 S. W. 680; 2 *Jones on Real Property*, secs. 1377, 1378.]"

These patents thus recorded, imparted notice to the Collector and all other persons that Amzi Rudolph had assigned his land warrants covering the land in question to William B. Dorn, and that the latter, on November 1, 1859, became the record owner of said lands.

IX. We have given full consideration to all the questions involved in this litigation, and find nothing

Miller v. Bufton.

Conclusion. in the record which would warrant us in disturbing the judgment below in favor of plaintiffs. We accordingly affirm the judgment. *Brown, C.*, concurs.

PER CURIAM: The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All of the judges concur; *Bond, P. J.*, in the result.

E. H. MILLER et al. v. CORDELIA LLOYD et al.;
JAMES D. BUFTON et al., Appellants.

Division One, June 4, 1918.

1. **EQUITABLE TITLE: Entries Prior to Patents: Issued After Suit Brought.** Entry vests the equitable title in the entryman, and such title is sufficient to support a suit to quiet title; and where patents issued after the suit was brought are not in the record, it will be assumed on appeal, in aid of the judgment based on them, that they were issued on entries properly made prior to the institution of the suit.
2. **ACCRETIONS: Saltatory: Intervening Creek.** If the accretions formed upon the old river bank and extended across in front of the mouth of a creek, they became at once a part of the land reaching the bank at that point, and a subsequent cutting by the creek of a channel through the accretions would not affect the title thereto; and if the evidence shows that in seasons of high water accretions would form along the old river bank, near and in front of the mouth of the creek, that the creek itself would be filled with silt for some distance back of its mouth, that as the high waters receded the creek would force its way through these accumulations, and that the deposits were made from the river bank outward, in the creek and on both sides of it, it cannot be ruled that the waters of the creek separated the accretions from the river bank.
3. **——: Judgment: In Proportion to Frontage.** A judgment which awards accretions in proportion to the original river frontage prior to their formation, is in accord with well recognized legal principles.

Miller v. Bufton.

Appeal from Clay Circuit Court.—*Hon. Frank P. Divelbiss*, Judge.

AFFIRMED.

Martin E. Lawson, Ralph Hughes and John C. Grover for appellants.

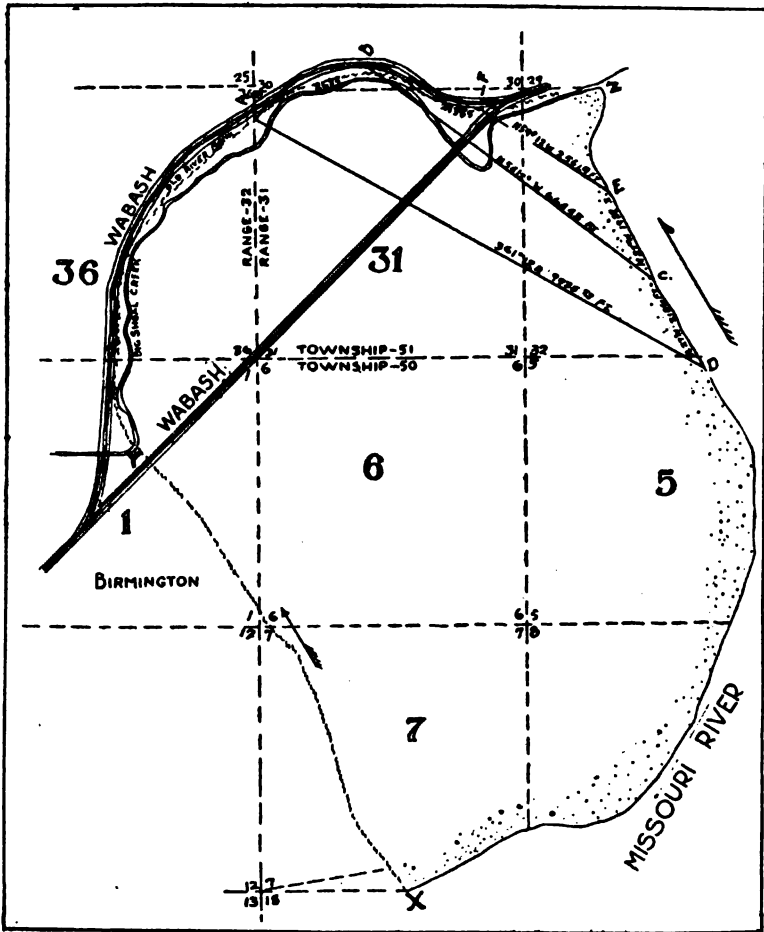
(1) A patent to land from the United States Government conveys title to the land only from the date of the issuance of the patent. *Bagnell v. Broderick*, 13 Peters, 450; *Monson v. Simonson*, 231 U. S. 347; *Langdon v. Sherwood*, 124 U. S. 83; *Redfield v. Parks*, 132 U. S. 245; *Texas P. R. Co. v. Smith*, 159 U. S. 68. (2) The rights of the parties to an action must be determined according to the facts existing at the time the action was commenced. The plaintiff must, therefore, recover, if at all, according to the status of his rights at the time of the commencement of the action. *Tobin v. McCann*, 17 Mo. App. 481; *Weinwick v. Bender*, 33 Mo. 80; *Worth v. Springfield*, 22 Mo. App. 17; *American Bonding Co. v. Gibson Co.*, 145 Fed. 871. (3). Accretions are not saltatory, but must gradually and imperceptibly form themselves to the mainland, and the existence of an intermediate stream of water between the accretions and the mainland makes it impossible for the accretions to attach to the mainland. *DeLassus v. Faherty*, 164 Mo. 361; *Crandall v. Smith*, 134 Mo. 640; 1 *Farnham on Waters*, p. 328, par. 71a; *Gould on Waters* (3 Ed.), 313; *Kinney on Irrigation and Water Rights*, 929.

Simrall & Simrall and *Theodore Emerson* for respondents.

(1) There is nothing in the evidence involving the "saltatory doctrine of accretions" in this case, but this evidence shows that the creek flowed over the accretions, instead of the accretions jumping the creek, and the court properly refused the instruction asked by appellants. (2) That said instruction was properly

refused because it would have deprived plaintiffs and other respondents of all their frontage and given some to an adjoining riparian owner, a result never allowed. *Crandall v. Allen*, 118 Mo. 403; see also *Deerfield v. Arms*, 48 Am. Dec. 277, 17 Pick. 41; *Gray v. Deluce*, 5 Cush. 9; *Thornton v. Grant*, 10 R. I. 487; *Kehr v. Snyder*, 114 Ill. 313; 1 Am. & Eng. Ency. Law (2 Ed.), p. 477; 29 Cyc. 350 (note); *Manchester v. Iron Works*, 13 R. I. 355. (3) The judgment correctly divides the accretions among the contiguous riparian owners, by dividing the new shore line in proportion to their respective rights in the old shore line and drawing lines from the points of division thus made, to the points at which the old shore line is intersected by the boundaries separating the proprietors. 29 Cyc. 353.

BLAIR, J.—This is a suit to quiet title. [Sec. 2535, R. S. 1909.] The dispute arises over accretions, and the attached plat presents the situation.



It is admitted, subject to an objection to certain patents, that certain of the respondents own those portions of sections 30 and 31 which fronted on the old river bank as shown by the plat. It is also admitted that appellant Bufton owns those parts of sections 1 and 36, as shown by the plat, which fronted on the old river bank. That bank formerly extended from X through Y, A, B and F to Z. The new river front extends from X through D, C and E to Z. The accretions lie within these lines.

I. The suit was begun in 1912. On the trial patents issued in 1913 and 1914 were offered. These patents cover the larger part of the lands claimed by respondents. We understand it to be admitted that the patentees are persons whose title respondents have acquired by mesne conveyances. The point made by appellants is that title had not emanated from the Government until the patents issued; that these did not issue until after suit brought; therefore, that the suit cannot be maintained. The patents are not in the record. Their recitals are binding on the Government and patentee. They may have shown the patents were issued on entries properly made and prior to the institution of the suit. In aid of the judgment, the patents being before the trial court and not before us, we so assume. Such entry vests the equitable title in the entryman and such title is sufficient to support a suit under Section 2535.

II. Formerly, Big Shoal Creek flowed into the river at the point marked "Y" on the plat. The evidence tends to show that in seasons of high water accretions would form along the old river bank, near and in front of the mouth of this creek and that the creek itself would be filled with silt for some distance back of the mouth; that as the high waters receded the creek would force its way through these accumulations; sometimes in a short time and sometimes several weeks or months after the waters of the river receded; that the deposits were made from the river bank outward, in the creek and on both sides of it. The trial court found these to be the true facts. There was also evidence that the creek was always a running stream, except when and to the extent high water covered it; that at times it was almost inconsiderable in width and depth near the mouth, but that there was always a stream of some kind flowing into the river except as just stated. Appellants' theory is that this stream at all times

**Accretions
Over Mouth
of Creek.**

separated the accretions in dispute from the land of respondents, and they invoke the doctrine that accretions are not saltatory, i. e., that they could not leap the creek. *DeLassus v. Faherty*, 164 Mo. l. c. 372, et seq. is relied upon. If appellants' theory of the facts is accepted that case supports the conclusion they draw. The same decision (l. c. 373, 374) justifies the judgment rendered if the facts are as the trial court found them. If the accretions formed upon the old river bank and extended across in front of the mouth of Shoal Creek they became at once a part of the land reaching the bank at that point. The subsequent cutting of a channel through the accretions formed would not affect the title thereto. This is held in *DeLassus v. Faherty*, and is sound law. In that case, as in this, any other judgment than that rendered would deprive respondents of all their river frontage. The judgment rendered gives them frontage and accretions proportioned to their original frontage prior to the formation of the accretions. This is in accord with well recognized principles. A judgment for appellants would extend their property "longitudinally down the river and between" respondents' land and the river. This does not appeal to the equities of the situation. The case was tried and is argued here as one at law. There is undoubtedly substantial evidence to support the finding of the trial court. If it be said the character of respondents' title transforms this into a suit in equity, we think proper deference to the finding of the chancellor requires us to say his finding must be upheld. This, because the evidence on the disputed question is well balanced and he was in better position to resolve the conflict.

III. Complaint is made of the refusal of an instruction. Though the case be treated as one at law this assignment must be overruled. Instructions given sufficiently covered the question involved. Affirmed. All concur.

Instruction.

DANIEL G. SAUNDERS, SR., et al., Appellants, v.
HACKLEY & HUME COMPANY, LTD., et al.

Division One, June 4, 1918.

1. **GARNISHMENT: No Indebtedness to Defendant.** No judgment can be rendered against garnishees unless it appears that at the time of the service of the writs they were in possession or custody of money or property or effects belonging to the defendant or were indebted to defendant.
2. ———: ———: **Voluntary Transfer of Assets.** Even if defendant corporation was at the time indebted to plaintiff, as made manifest by subsequent suit, though no claim had previously been made, a voluntary transfer of negotiable bonds and notes in the form of dividends to stockholders, is not presumptively fraudulent in law nor voidable, if defendant owed nothing except plaintiff's claim and retained sufficient property to pay said claim.
3. ———: ———: ———: **Burden of Proof.** The burden rests upon the interpleading stockholders of defendant corporation to prove that, at the time of the voluntary transfer to them, as dividends, of negotiable bonds and notes payable to defendant, the defendant retained sufficient assets to pay plaintiff's claim; but having established that fact by showing that defendant still owns property far in excess of plaintiff's claim, and that there was no actual fraud, the writs of garnishment must be dismissed.

Appeal from Jackson Circuit Court. —*Hon. William O. Thomas*, Judge.

AFFIRMED.

Rees Turpin for appellants.

(1) The transfer of the notes and bonds in question was voluntary, that is, it was without consideration.
(2) The circuit court erred in holding as a matter of law that the voluntary conveyances shown by the evidence will not operate to hinder or delay creditors. *Star v. Penfield*, 166 Mo. App. 302; *Walsh v. Ketchum*, 84 Mo. 427; *Clark v. Thias*, 173 Mo. 628; *Crowe v. Beardsley*, 68 Mo. 435; *Payne v. Stanton*, 59 Mo. 158;

McCollum v. Crain, 101 Mo. App. 522; Hoffman v. Nolte, 127 Mo. 120; Eddy v. Baldwin, 32 Mo. 369; Van Deventer v. Goss, 116 Mo. App. 316; Scharff v. McGaugh, 205 Mo. 344; Harding v. Elliott, 91 Hun. 502; Baker v. Lyman, 53 Ga. 339; Church v. Chapin, 35 Vt. 221; Botsford v. Beers, 11 Conn. 369; Walther v. Null, 233 Mo. 104; Johnson v. United Rys. Co., 247 Mo. 326; National Tube Works v. Machine Works, 118 Mo. 365; Shields v. Hobart, 172 Mo. 491. (3) The plaintiffs were existing creditors at the time of the last distribution of assets. (4) The circuit court erred in holding that there is no evidence in this case of fraudulent intent. Ross v. Crutsinger, 7 Mo. 245; Mosby v. Commission Co., 91 Mo. App. 500; Bank v. Russey, 74 Mo. App. 651; State to use v. Mason, 112 Mo. 374; Cole v. Cole, 231 Mo. 236; Spengler v. Kaufman, 46 Mo. App. 644; Bank v. Keeney, 154 Mo. App. 285; Reed v. Pelletier, 28 Mo. 173; State to use v. O'Neill, 151 Mo. 67.

Massey Holmes for garnishees, respondents;
Holmes, Holmes & Page for interpleaders, respondents.

(1) It was proper to grant a new trial since the cause should not have been submitted to the jury at all. Lynch v. Turrish, 236 Fed. 653. 2 Cook Corporations (6 Ed.), sec. 545, 7 R. C. L. p. 294; 2 Cook Corporations (6 Ed.), sec. 541, 7 R. C. L. p. 295; McLaran v. Planing Mill Co., 117 Mo. App. 40; Gentry v. Field, 143 Mo. 399; Bump on Fraudulent Conveyances (2 Ed.), pp. 34, 21; 12 R. C. L. pp. 536, 593; Welch v. Mann, 193 Mo. 304; Coleman v. Hagey, 252 Mo. 135.

BOND, P. J.—I. The plaintiffs sued Hackley & Hume Company, Ltd., a corporation, organized in 1903, under the laws of the State of Michigan, for the sum of \$94,894.22, claimed as a commission on a sale of a tract of timber land in Louisiana, which was sold and conveyed to defendant on April 1, 1910, to the Delta Lumber Company, a subsidiary company of its guarantor, the Central Coal & Coke Company.

Pleadings.

Upon the institution of the suit by plaintiffs, an attachment was awarded, whereunder writs of garnishment were executed upon the Delta Lumber Company and the Central Coal and Coke Company. These garnishees denied the possession or custody at the time of the service of writs upon them, of any money, property, or effects belonging to Hackley & Hume Company, Ltd., the defendant in the suit brought by plaintiffs for commission as above stated.

The Delta Lumber Company further answered that prior to the service of the garnishment, to-wit, about April 1, 1910, it delivered \$350,000 of its first mortgage five per cent bonds, payable to bearer, to the Hackley & Hume Company, Ltd., all of said bonds maturing from March 1, 1920, to March 1, 1927, bearing interest coupons payable semi-annually, and that on the same date (April 1, 1910) it gave to defendant twenty-four negotiable promissory notes aggregating \$1,550,000, maturing serially each successive six months thereafter, and bearing five per cent interest payable semi-annually.

This garnishee also averred, on information and belief, that none of these first mortgage bonds, nor interest notes, was, at the time of the garnishment, either owned or held by the defendant, but had been previously assigned, delivered and transferred, specifying the name of the transferees.

The Central Coal & Coke Company answered similarly, with the further averment that it had guaranteed the payment of the promissory notes executed by the Delta Lumber Company.

Interpleas were filed by the persons named as interpleaders, setting up title to the respective portions of the notes and bonds of the Delta Lumber Company claimed by such interpleaders.

Plaintiffs denied the answers of the garnishees and made answer to the claims set up by the interpleaders, in both of which pleadings plaintiffs averred that if there had been any assignment of the notes and bonds given to the defendants by the Delta Lumber Company, it was voluntary and fraudulent.

Upon the trial the jury found that the garnishees were indebted to the defendant, the Hackley & Hume Company, Ltd., in the sum of \$1,805,000 and \$350,000, the latter evidenced by the bonds of the Delta Lumber Company. The jury also found in favor of the plaintiffs against the claims of the interpleaders.

After a judgment in accordance and reserving jurisdiction, the garnishees and interpleaders filed motions for a new trial, which were sustained, in a written memorandum by the learned trial judge, on the theory that upon the undisputed facts, which were set out in the pleadings of the garnishees and interpleaders, no case was made for a jury.

II. The facts are that the Hackley & Hume Company, Ltd., was a Michigan corporation which acquired certain timber lands in the State of Louisiana, which it held for sale, and distribution of proceeds among its stockholders; that its capital stock was \$1,200,000, all paid in cash; that after the death of Mr. Hackley in 1905, who owned three-fourths of the shares of the company, which passed by his will, the directors concluded to liquidate the company's assets and distribute the proceeds of the sale of its lands among its stockholders; that the corporation had no operating expenses and was not indebted, at the date of the trial, unless as claimed in the suit of plaintiffs; that these distributions were in the form of dividends; that upon the sale, in April, 1910, of certain lands in the State of Louisiana, to the Delta Company and the payment of the purchase price in the form of bonds and notes of that company to the Hackley & Hume Company, Ltd., the latter company distributed these, on June 13, 1910, in the form of a dividend to its shareholders by resolution of its board of directors duly entered upon its corporate records; that a large amount of the securities (bonds and notes) went into the trust funds created by the will of Mr. Hackley and the will of his widow, and the remainder to stockholders of the defendant or their assignees. It was admitted that the interpleaders,

who claimed under these two wills and as or through shareholders, were the rightful distributees; that after the payment of the dividend thus distributed on June 13, 1910, the remaining assets of the defendant consisted of \$4,000,000 of real estate in Louisiana, and at the time of the trial the defendant had remaining assets of timber lands in Louisiana of the value of \$2,000,000.

It was undisputed that at the time of the declaration and distribution of the stockholders' dividend, on June 13, 1910, the managing officers who ordered the same had no knowledge of the claim of plaintiffs, nor was there any evidence of intention on the part of any other officers in any way to hinder, delay or defraud the plaintiffs, the first intimation of whose claim against the defendant was contained in a letter dated August 10, 1910, addressed to "Messrs. Hackley & Hume, Muskegon, Michigan," as follows:

"I am informed that you have consummated the sale of the timber land in Vernon Parish, Louisiana, to the Central Coal & Coke Company, in regard to which I began negotiations on your behalf in July, 1907. Our commission for making the sale became due upon its consummation and we hope it is convenient for you to settle with us now.

"Your truly,

D. C. SAUNDERS."

III. In any view of the case no judgment could be rendered against the garnishee unless it appeared that at the time of the service of the writs they **Garnishment.** were in possession or custody of money or property or effects belonging to the defendant or were indebted to it. The conceded facts are that when the writs of garnishment were levied there was nothing in the hands or possession of either garnishee subject to seizure under said writs unless they were leviable on the liability of the garnishees for the bonds and notes given in payment for the land sold in April, 1910. Both of these forms of indebtedness were of the highest negotiability. Neither were mature. The bonds being payable to bearer were transferrable by delivery and the notes were transferrable by endorsement and delivery. When the garnishment writs were

served the bonds and notes given to defendant had been transferred and delivered to other persons (the interpleaders). It is not claimed that such transfers were made with any actual intent to defraud, nor with knowledge on the part of the transferrors or transferees or garnishees of the claim of plaintiffs which was subsequently asserted in the letter quoted herein.

In these circumstances the only possible theory upon which such indebtedness could be attached is, that it existed when the debtors were garnished and that the previous transfers thereof by the defendant were voidable against plaintiffs, as attaching creditors, because voluntary and therefore presumptively fraudulent in law as to attaching or judgment creditors. [Clark v. Thias, 173 Mo. l. c. 652.]

Even if it be conceded for the argument that no corporation can turn over its assets to its shareholders, without other consideration than that status, to the prejudice of the claims of its attaching and judgment creditors, still that principal has no application where, as here, the undisputed fact is that the defendant corporation retained other assets at the time of the trial, of the value of two millions of dollars in the form of other real estate owned by it in Louisiana which was subject to no liens or charges and amply sufficient to satisfy plaintiffs' demand and that defendant owed nothing, unless the amount sued for in the principal case shall be established as a debt against it. [Coleman v. Hagey, 252 Mo. l. c. 135; Welch v. Mann, 193 Mo. 304, 324; 12 R. C. L. p. 593.]

If, therefore, the distribution by defendant of a portion of its assets arising from a sale of a part of its Louisiana lands was, as to plaintiffs, voluntary, it was not fraudulent in law or voidable under the facts in this record, since the proof was uncontroverted that defendant retained the title to similar lands more than sufficient to pay all the claims of plaintiffs. The burden of proving that fact rested upon and was discharged by the interpleaders (Clark v. Thias, 173 Mo. l. c. 652.), and hence neither their title nor the indebted-

State ex rel. Lamkin v. Hackmann.

ness of the garnishees, under the circumstances shown on the trial, was charged or affected with any attachment lien in favor of plaintiffs by the service of the writs of garnishment.

The ruling of the learned trial judge in sustaining the issue joined under the writs of garnishment between plaintiffs and the garnishees and interpleaders, was correct and is affirmed. It is so ordered. All concur.

THE STATE ex rel. UEL W. LAMKIN, Superintendent of Public Schools, v. GEORGE E. HACKMANN, State Auditor.

In Banc, June 13, 1918.

SUPERINTENDENT OF SCHOOLS: Traveling Expenses: Outside of State. Since the Legislature appropriated money to pay the traveling expenses of the office of State Superintendent of Public Schools, and the statute prescribing his duties says he shall have power "to in every way elevate the standard and efficiency of the instruction given in the public schools of the State" and further says that "all moneys reasonably expended in the execution of these duties shall, upon due proof," be allowed and paid by the State, the question of the necessity and expediency of incurring expense for this purpose, in the absence of statutory restriction, is to be determined by the Superintendent, and not by the State Auditor; and in consequence a reasonable expense account incurred by the Superintendent in railroad fares and hotel accommodations in attending an annual meeting, at Portland, Oregon, of the National Education Association, composed of superintendents of public schools in all the States and of leading teachers and educators throughout the county and organized to promote, foster and encourage the cause of public education generally, should, upon the Superintendent's approval, be audited by the State Auditor for payment out of the moneys so appropriated, as an expense useful and properly to be incurred in the performance of the Superintendent's statutory duty "to elevate the standard and efficiency of the instruction given in the public schools of the State."

Held, by WALKER, J., dissenting, that the statutes contain no intimation of a requirement that the State Superintendent shall attend educational associations, and without a statute declaring, either in express terms or by reasonable implication, it to be his duty to attend national educational associations, the Legislature itself could not appropriate money to pay his traveling expenses in attending them.

Mandamus.

WRIT GRANTED.

A. T. Dumm for relator.

(1) Mandamus is the proper remedy. State ex rel. v. Gordon, 236 Mo. 142; State ex rel. v. Wilder, 199 Mo. 470; State ex rel. v. Wilder, 196 Mo. 429; State ex rel. v. Meier, 143 Mo. 447; Mansfield v. Fuller, 50 Mo. 339; 26 Cyc. 235, 236; 19 Am. & Eng. Ency. Law (2 Ed.), 782-785; High, Extra. Rem. (3 Ed.), sec. 104; Merrill on Mandamus, sec. 126. (2) And the return in the nature of a demurrer to the petition for the writ (which, under the stipulation, stands as and for the alternative writ itself) admits the facts pleaded in the petition. State ex rel. v. Reynolds, 256 Mo. 714; State ex rel. v. Gordon, 231 Mo. 559; State ex rel. v. Cook, 171 Mo. 354; High, Extra. Rem. (3 Ed.), sec. 449. (3) Mandamus being the proper remedy, and the facts alleged in the petition being admitted, the only question remaining for the court to decide is as to the law applicable to the admitted facts, and the law being clearly in relator's favor, the peremptory writ of mandamus should be awarded. Sec. 10922, R. S. 1909; Laws 1917, p. 10, sec. 22; Secs. 10920, 11813, R. S. 1909; High, Extra. Rem. (3 Ed.), sec. 449.

Frank W. McAllister, Attorney-General, *Thomas J. Cole* and *John T. Gose*, Assistant Attorneys-General, for respondent.

(1) A demurrer only admits those facts which are well pleaded. Paving Co. v. Fleming, 251 Mo. 222; Meek v. Hurst, 223 Mo. 696; Donovan v. Boeck, 217 Mo. 70. (2) Relator's right must be clear. "It is a principle of the law of mandamus that the relator must have a clear right to the performance of the act sought to be coerced by the mandate of the court." State

ex rel. v. Thomas, 245 Mo. 71. "In order for the writ of mandamus to be available, it is essential that the relator have a clear legal right to the thing demanded, and it must be the imperative duty of the respondents to perform the act required." 19 Am. & Eng. Ency. Law (2 Ed.), 725; State ex rel. Doud v. Lesueur, 136 Mo. 452; State ex rel. v. Appling, 191 Mo. App. 392; High on Extraordinary Remedies, sec. 12, p. 17.

FARIS, J.—This is an original proceeding by mandamus to compel the respondent, who is the State Auditor, to audit for payment two expense-accounts for traveling expenses incurred by the petitioner, who is the State Superintendent of Public Schools.

The issuance of an alternative writ was waived by the respondent and it was agreed that the petition for the writ should stand for all purposes as and for the alternative writ.

The pleadings state the case. The first count, omitting formal parts, and parts already substantially stated, runs thus:

"Your petitioner says that, in the month of July, 1917, in connection with and in the discharge of the duties of his office as Superintendent of Public Schools of Missouri, as aforesaid, he attended the annual meeting of the National Education Association at the City of Portland, State of Oregon; that petitioner is, and, at the time hereinabove mentioned was, a member of said National Education Association; that said National Education Association is constituted and composed of the superintendents of the public schools of the various States of the Union, and of leading teachers and educators throughout the United States; and that the purpose of the organization of said National Education Association, and of the annual meetings of the same held in different cities of the country, is to promote, foster and encourage the cause of public education, and to elevate the standard and efficiency of the instruction given in the various States of the

Union, and throughout the United States generally; and that the attendance of your petitioner at said annual meeting of said National Education Association, in the City of Portland, Oregon, in said month of July, 1917, was by him believed to be, and your petitioner alleges that it was, useful and necessary to the proper and efficient discharge of the duties of his said office, and tended to promote and advance the cause of public education in Missouri, and to elevate the standard and efficiency of the instruction given in the public schools of this State; and that his attendance at said meeting was authorized by the laws of this State prescribing his powers and duties, and more particularly by the provisions of Section 10922, Revised Statutes 1909.

"Your petitioner says that, in attending said annual meeting of said National Education Association, at the time and place aforesaid, he actually expended the sum of \$140.65, and that said amount was the reasonable and actual expense of his said attendance at said meeting, including necessary railroad fare, hotel bills, and other expenses reasonably and actually necessary to his attendance at said meeting; and that no personal expenses were or are included in said above-mentioned sum.

"Your petitioner says that thereafter, and on the 5th day of September, 1917, he presented to the said George E. Hackmann, State Auditor as aforesaid, his account in said sum of \$140.65 (which said account had theretofore been duly approved by petitioner as Superintendent of Public Schools of Missouri) for allowance as a claim against the State of Missouri, as authorized and provided by said Section 10922, Revised Statutes 1909, and to be paid out of the moneys appropriated for the contingent and traveling expenses of the department of education, said moneys being appropriated by Act approved April 11, 1917, entitled 'An Act to appropriate money for the support of the state government, the payment of the contingent and the incidental expenses of the state departments,' etc.,

State ex rel. Lamkin v. Hackmann.

and being Section 22, page 10, of Laws of Missouri 1917; that at the time your petitioner presented said account to the said George E. Hackmann, State Auditor as aforesaid, for allowance, there was, and is now in the State Treasury, to the credit of the traveling expense account of the moneys appropriated for the contingent and traveling expenses of the department of education, more than sufficient money to pay said account of \$140.65; and that it then and thereupon became the duty of the said George E. Hackmann, State Auditor as aforesaid, to audit and allow said account in said sum of \$140.65; but your petitioner says that the said George E. Hackmann, State Auditor as aforesaid, wrongfully failed and refused, and does still wrongfully fail and refuse, to audit and allow said account in said sum of \$140.65, or in any other sum, for the reason, as your petitioner is informed and believes, that it is the opinion and decision of the said George E. Hackmann, State Auditor as aforesaid, that your petitioner is not entitled to have audited and allowed, as a claim against the State of Missouri, any expenses made or incurred by him outside the State of Missouri.

"Your petitioner says that he is remediless in the premises by or through ordinary process or proceedings at law, and he therefore prays this Honorable Court to issue its writ of mandamus directing and commanding the said George E. Hackmann, as the State Auditor of Missouri, to audit and allow your petitioner's said claim in said sum of \$140.65, and for such other relief as to the court may seem meet and proper in the premises."

The second count is a substantial rescript of the first count, except that it is bottomed upon expenses incurred in a trip to Washington, D. C., the nature of which is thus set forth:

"First: To consult with the Federal Board for Vocational Education regarding the terms under which Federal money should be made available for the State of Missouri for the purposes of reimburse-

ments to school districts for moneys expended for the salaries of teachers of trade, industrial, home economics subjects, and teachers of agriculture, and for the training of such teachers. Your petitioner says that said Federal Board is created by act of Congress, and is appointed by the President to administer the Smith-Hughes Act, under which moneys are annually granted to the various States for the above purposes; that said Federal Board notified both your petitioner and the Governor of Missouri that the State of Missouri should be represented at said meeting; that the law of Missouri (Sec. 3, page 513, Laws 1917) vests the disbursements of moneys received by the State for the above purposes in the State Board of Education, and that your petitioner, as Superintendent of Public Schools, as aforesaid, is ex-officio chairman of said State Board of Education, and is designated by Section 11, page 516, Laws of Missouri 1917, as the executive officer of said board for the administration of said act.

"Second: To attend, at the same time and place, a conference of State Superintendents of seven States, Missouri being one of them, said conference being called by Hon. P. P. Claxton, United States Commissioner of Education, appointed by the President, and directing general educational affairs throughout the United States, said conference being called to consider the condition of the public schools and the work of the public schools in said seven States during the period of the war and immediately following the war."

To this petition and to both counts thereof respondent demurred. His demurrer, omitting formal parts, runs thus:

"1st. Because neither said first nor second count states facts sufficient to constitute a cause of action against this respondent.

"2nd. Because neither said first nor second count is sufficient in law.

"3rd. Because it appears upon the face of said first and second counts and each of them, that the ex-

State ex rel. Lamkin v. Hackmann.

penses made and incurred by relator, to compel the payment of which relator asks for this court's extraordinary writ of mandamus, were expenses made and incurred without the State of Missouri.

"4th. Because Section 10922, Revised Statutes 1909, and Section 22, Laws 1917, page 10, set up in each of said counts of said petition, show upon their face that the money appropriated for the payment of traveling expenses incurred by relator's department can be used only in payment of expenses made and incurred within the State of Missouri."

There is no point made touching whether mandamus is the proper remedy, hence we make none and do not examine the point, assuming, as learned counsel upon both sides do, that mandamus is the proper remedy.

The point presented is a narrow one. Is the State under the law which provides for the duties of the State Superintendent of Public Schools (hereinafter called for brevity, Superintendent) liable to pay the traveling expenses of such Superintendent, incurred under the circumstances set forth in our statement of the case? We see no vital difference in the applicatory law as between the expenses involved in the two counts, and therefore the reasons for the payment or refusal of payment of the expenses incurred upon the trip to Portland ought to be decisive of the other. We consider the first count, for if there be any difference, there are reasons favoring payment of the expenses sued for in the second count which are not found in the first count. The effect of the demurrer is to admit that petitioner is a member of the National Educational Association; that such association is composed of the Superintendents of Public Schools of the various States of the Union, and of leading educators and teachers of the United States; that the purpose of this association and of the annual meetings held by it "is to promote, foster and encourage the cause of public education, and to elevate the standard and efficiency of instruction . . . throughout the United States;" and that the petitioner believed that attend-

ance upon this meeting was useful and necessary, and that it in fact was "useful and necessary to the proper and efficient discharge of the duties of his said office and tended to promote and advance the cause of public education in Missouri, and to elevate the standard and efficiency of the instruction given in the public schools of this State."

The demurrer does not admit the petitioner's conclusions of law set forth in his petition, to-wit, that he made such trips and incurred the expenses in dispute "in connection with and in the discharge of the duties of his office . . . and that his attendance at said meeting was authorized by the laws of this State prescribing his powers and duties." These are questions of law for this court, and they are the only questions of either law or fact in the case.

The Legislature recognized the necessity of providing a fund to cover the travelling expenses of the office of State Superintendent of Public Schools, for it appropriated therefor the sum of \$14,000, to cover these expenses during the biennial period ending December 31, 1918. [Sec. 22, p. 10, Laws 1917.] This was tantamount to a legislative construction of Section 10922, Revised Statutes 1909, as meaning that *some travel* and therefore *some traveling expenses*, are necessary under the law which prescribes the duties of the Superintendent. However, another statute, indicates this necessity more clearly than the legislative interpretation mentioned. For pertinent parts of the statute prescribing the place of residence and the place wherein the office of the Superintendent shall be kept, says:

"He shall reside and the books and papers of his department shall be kept at the seat of government, where a suitable office shall be provided by the State, at which he shall give his attendance when not absent on public business." [Sec. 10920, R. S. 1909.]

But these statutes and the legislative construction mentioned, while making it clear that some travel is necessary, do not make clear *what travel may be at*

the expense of the State. It is persuasive, however, that if the Legislature had in mind to restrict the expenditure of the money appropriated to expenses incurred in travel wholly within this State, it could, by adding three words to the language of the appropriation, have put this question beyond cavil. The authority to travel at the expense of the State, we concede, must be found in some statute, or arise by the most obvious implication from some statute, otherwise there is no obligation on the part of the State to pay the expenses incurred thereby. The statute which prescribes the duties of the Superintendent, so far as it is in any way pertinent to the point involved, reads thus:

“It shall be the duty of said Superintendent of Public Schools to make an annual report on or before the first Wednesday in January, in each and every year, to the General Assembly, when that body shall be in session any such year; and when not in session any one year, then the report shall be made to the Governor, who shall cause the same to be published, and shall also communicate a copy thereof to the next General Assembly. The State Superintendent, in the annual report of his labors and observations, shall present . . . a statement of plans for the management and improvement of public schools, and such other information relative to the educational interests of the State as he may deem important. He shall, in person or by deputy, confer with and advise county officers on all matters pertaining to the school law and school directors, and all other school officers, teachers and patrons of the public schools. He shall have power, in person or by deputy, to visit and inspect schools, and make suggestions in regard to the subject-matter and methods of instruction offered, the control and government of the school, and the care and keeping of all school property. He shall have power to attend and assist in meetings of teachers, directors or patrons, and to in every way elevate the standard and efficiency of the instruction given in the public schools of the

State. All moneys reasonably expended in the execution of these duties, as prescribed by this section, shall, upon due proof, be allowed by the auditor, and paid out of the State Treasury: *Provided*, that no personal expenses be included in the above allowance." [Sec. 10922, R. S. 1909.]

Does this statute prescribe such duties as may in the fulfillment thereof necessitate incurring expenses such as those in dispute? We think it does. Among the Superintendent's statutory duties it is written: "He shall have power to attend and assist in meetings of teachers . . . and to in every way elevate the standard and efficiency of the instruction given in the public schools of the State." Should it be contended that the "meetings of teachers" mentioned are meetings of state or local teachers, and not meetings of national or international "leading teachers and educators without the State," so much on this phase may be conceded. But there yet remains the incumbent duty "to in every way elevate the standard and efficiency of the instruction given in the public schools of this State." This is a broad and comprehensive duty, and in fulfilling it, of necessity much is left to the discretion of the Superintendent. It is difficult to see how it is to be complied with unless the officer whose official duty it is to elevate standards and efficiency shall have an opportunity to ascertain what standards and efficiency have been attained by teachers and educators in other States of the Union. Unless we are now to build a Chinese Wall about this State, and thus inferentially serve notice to all and sundry that in educational matters, we have attained absolute perfection in standards and efficiency, and that hereafter we shall go to school to no man but a native, to no school but a local one, and that none of the other forty-seven states are capable of adding jot or tittle to our educational knowledge, standard or efficiency, we must take steps to ascertain the progress which is being made by others. The motto, *nobis est demonstrandum*, which persiflage has attributed to us, may in some

respects be wholly commendable, but we ought not to carry it so far as to assume that there are none capable of imparting information to us. It is, we think, necessary if standards and efficiency in education in this State are to be kept abreast of the progress in other States, that the head of the public school system should be advised as to what educators elsewhere are doing. No better way perhaps for doing this has been devised than by conventions and conferences of the leaders in educational progress. That it is possible for the privilege of attending such conventions at the expense of the State to be abused is no argument in favor of entirely cutting off the necessary privilege. If it is proper and necessary to attend these conferences, some one must be vested by law with the authority of deciding upon the expediency of it. We think the question of the necessity and expediency of incurring the expense in issue for the purpose mentioned has been by the statute conferred on the Superintendent of Schools, and not upon the State Auditor. If the privilege be abused the people exercising their political power can correct the abuse at the polls. Obviously we are not holding that if the expenses incurred were for travel which, patently, had no relevancy to the Superintendent's statutory duties that the Auditor would be bound to audit them, merely because the Superintendent had approved them. That situation is not presented by the record before us.

We are of opinion that the statute fixing the duties of the State Superintendent of Public Schools, holds in contemplation the necessity of attendance upon meetings and conferences and conventions of the sort here in question. It follows that the preliminary writ herein should be made peremptory. Let it be so ordered. All concur except *Walker, J.*, who dissents in a separate opinion.

WALKER, J. (dissenting)—The State Superintendent of Public Schools is an official whose duties are defined, compensation fixed, and the expenditures

of his office regulated by statute. To this we must look to determine his right to demand payment for expenses incurred in attending national educational associations. If the statute defines such attendance either by express terms or reasonable implication as one of his duties, then a basis has been established for the allowance of this claim. Otherwise, not. Even the Legislature itself could not under our State Constitution (Art. IV., sec. 48) appropriate public money to pay such expenses in the absence of a statute authorizing or requiring such attendance and thereby rendering it a duty. If the Legislature has no such power, can it be said, with proper regard for the rules of interpretation, that the courts, which can only define but cannot create power, possess it?

An examination of the statute defining the duties of the Superintendent does not disclose any intimation of a requirement that he shall attend educational associations. However much, therefore, we may be inclined to the conclusion that such attendance may prove beneficial in tending to broaden the mental horizon of the Superintendent, and thereby render him more efficient in the discharge of his authorized duties, we cannot lend our approval in the absence of at least a permissive statute to the expenditure by him of public money limited only to his discretion. Such a ruling, would, in our opinion be the making, rather than the declaring, of a law.

As the barber said to the coal heaver in declining to render him tonsorial service, "The line must be drawn somewhere." We draw it at the Constitution. Wherefore, this dissent.

THE STATE ex rel. WATERWORTH et al. v. A. L.
HARTY, Superintendent of Insurance.

In Banc, June 13, 1918.

INSURANCE: Schedule of Rates: Judicial Review: Original Jurisdiction.

The Supreme Court does not have original jurisdiction to judicially review, upon evidence to be heard by a commissioner, the ruling of the Superintendent of Insurance in refusing an increase of rates according to a schedule filed with him by the rate-making representatives of all stock fire insurance companies doing business in the State.

Petition for Review *De Novo*. or -

DISMISSED.

BOND, C. J.—This is an application by petitioners as the rate-making representatives of “all the stock fire insurance companies doing business” in this State, for a “judicial review,” upon evidence to be heard by a commissioner, of the ruling of the Superintendent of Insurance, in refusing petitioners an increase of rates according to a schedule filed with him March 27, 1918.

The matters of original cognizance thus presented do not lie within the constitutional jurisdiction of this court, which is “appellate only,” except as otherwise specified or directed in that instrument. [Const. 1875, art. 6, secs. 2 and 3; *Ib.*, art. 8, sec. 9; *Gantt v. Brown*, 244 Mo. l. c. 300; R. S. 1909, sec. 5951.] The application is therefore dismissed without prejudice to “a proper action” in a court of competent original jurisdiction. [Laws 1915, p. 318, sec. 15.]

All concur.

THE STATE ex rel. MISSOURI PACIFIC RAILWAY
COMPANY and BENJAMIN F. BUSH, Receiver,
Appellant, v. PUBLIC SERVICE COMMISSION.

In Banc, June 13, 1918.

PUBLIC SERVICE COMMISSION: Grain Scales: Repeal of Prior Statutes. The Public Service Act, by Section 49, Laws 1913, p. 538, invested the Commission with power to make an order for the erection and maintenance of track scales by a railroad company whenever public necessity therefor exists, and it repealed all prior statutes which interfere with the Commission's discretion to determine, in each individual case, the existence of the public necessity and public convenience. It repealed Section 3157, Revised Statutes 1909, which required a railroad company to erect and keep in good condition, for use in weighing grain shipped over its road, true and correct scales, at all stations from which the shipments for the previous year amounted to fifty thousand bushels or more. And an order of the Commission which requires such scales to be maintained at a certain station, based alone on said Section 3157 and a showing that for the previous year fifty thousand bushels were shipped from said station, without any further showing of public necessity or public convenience, is invalid.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

REVERSED AND REMANDED (*with directions*).

James F. Green and *H. H. Larimore* for appellant.

(1) The order of the Public Service Commission requiring the installation and maintenance of track scales at Rich Hill for the sole purpose of weighing carload shipments of grain, and Sec. 3157, R. S. 1909, on which said order is based, are a discrimination in favor of one class of shippers and are invalid and unauthorized. Sec. 23, Art. 12, Mo. Constitution; Railroad v. State, 107 Pac. 929; Midland Valley Railroad v. State, 133 Pac. 27; Ry. Co. v. Mo. Pub. Ser. Com., 192 S. W. 460. (2) The order of the Commission,

State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Com.

requiring the relators to expend money and use the property of the railway company in a specified manner, is not a mere administrative order, but is a taking of property and to be valid must be justified by a public necessity, and must not be unreasonable or arbitrary, and no such public necessity being shown, to enforce the order is to take relators' property without due process of law. *State ex rel. Oregon Ry. & Nav. Co. v. Fairchild*, 224 U. S. 510; *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340; *Interstate Com. Com. v. L. & N. Railroad Co.*, 227 U. S. 88; *Railroad v. Wisconsin*, 238 U. S. 491. (3) Sec. 3157, R. S. 1909, was in effect repealed by the Public Service Act approved March 17, 1913, and the order of the Commission is invalid in that it is based upon arbitrary provisions of said Section 3157, and not upon any findings of fact made by the Commission pursuant to a hearing held under the provisions of said Public Service Act. Sec. 49, Public Service Act, Laws 1913; *State ex rel. Rhodes v. Public Ser. Com.*, 270 Mo. 547; *State ex rel. M. K. & T. Ry. Co. v. Pub. Ser. Com.*, 271 Mo. 270. (4) If said Section 3157 has not been repealed, then to enforce the same, or any order of the Public Service Commission made pursuant to its terms, would be arbitrary and unreasonable and would constitute the taking of the property of relators without due process of law, in violation of the provisions of Section 1, Article 14, Amendments to the Constitution of the United States. *Mo. Pac. Ry. Co. v. Nebraska*, 217 U. S. 196; *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403.

A. Z. Patterson, General Counsel and *James D. Lindsay*, Assistant Counsel, for respondent.

(1) Track scales are a convenience—a facility or an instrumentality of transportation. All carload shipments are weighed by railroads on the first track scales available, and the freight charges, and all transactions between the shipper and carrier, are based exclusively upon this weight. Great Northern Railway

v. Minnesota, 238 U. S. 340. (2) Since track scales are a transportation facility, the Public Service Commission has been granted power by the Legislature (Section 49, Public Service Act) to require their erection and maintenance, when public convenience and necessity demand that they "ought reasonably to be provided." (3) Section 3157, R. S. 1909, has not been revoked by express repeal, nor is it directly in conflict with the provisions of the Public Service Act. If it is repealed by implication, or is violative of constitutional provisions, as providing for the taking of property without due process of law, it can only be authoritatively declared repealed or held unconstitutional by the judicial branch of the State government, and not by the Public Service Commission, a non-judicial body. Lusk v. Atkinson, 268 Mo. 109. (4) If this court finds that Section 3157 has been repealed, or is violative of constitutional provisions, it should not reverse the judgment of the circuit court *in toto*, but should direct the circuit court to remand the cause to the Commission for the taking of further testimony, and for the determination of the question of whether or not public convenience and necessity reasonably require the installation and maintenance of track scales at Rich Hill. "The court may, in its discretion, remand any cause which is reversed by it to the Commission for further action." Section 3, Public Service Act; See, also, Secs. 39, 49, Public Service Act; Shallenberger Elev. Co. v. Ill. Central Railroad, 278 Ill. 333.

GRAVES, J.—For a number of years the Missouri Pacific Railway Company has maintained track scales at Rich Hill, Missouri. For five or six months the scales had been out of repair, and were not in use. The company were about to remove the scales, and the commercial club of the city of Rich Hill filed complaint with the Public Service Commission asking that the railway company be compelled to erect and maintain proper scales on its tracks at such city. This the Public Service Commission directed, and their

judgment, under statutory *certiorari* to the circuit court of Cole County, was by such court sustained, and by appeal taken by the railway company and B. F. Bush, its receiver, the case comes here.

The order of the Public Service Commission, as well as the opinion of the commission does not find that these scales are a necessary public convenience, except in the following limited way. The commission in its opinion says:

“The Missouri statute provides that at all stations or places from which the shipment of grain by the road of any railroad company shall have amounted, during the previous year, to fifty thousand bushels or more, such railroad company shall erect and keep in good condition for use, and use, in weighing grain to be shipped over its road, true and correct scales, of proper structure and capacity, for the weighing of grain by carload in its cars. Such railway shall carefully and correctly weigh each car upon which grain shall be shipped from such place or station, both before and after the same is loaded, and ascertain and receipt for the true amount of grain so shipped (Sec. 3157, R. S. 1909).

“The provisions of Section 49 of the Public Service Commission Law are broad enough to justify a Commission order requiring track scales as a facility in connection with the transportation of property where the evidence shows a public convenience or necessity, or that such facility ‘ought reasonably to be provided.’

“In the judgment of the law-making body, as expressed clearly in Section 3157, *supra*, when the shipment of grain from any given point on the road shall have amounted during the previous year to 50,000 bushels or more, a public convenience or necessity arises, and therefore such scales ‘ought reasonably to be provided.’ ”

From this it is clear that the Commission was of the opinion that the terms of said Section 3157, Revised Statutes 1909, fixed the measure of public

necessity, and the evidence having shown the quantity of grain therein named, the Commission was bound to find a public necessity, although the other evidence might disclose a different situation. The other evidence did strongly tend to show a different situation. It is clear that the Commission based its judgment as to public convenience on this statute. In so doing the railway urges error, in that the statute is of no force since the passage of the Public Service Commission Act. Such is the case in a nut shell.

I. If the Public Service Commission in this case had, on the facts involved, and excluding the force of Section 3157, Revised Statutes 1909, found that there was a public necessity for the track scales sought, then we might have a different question here. The Commission makes no such finding. We doubt whether they could make such finding upon the facts presented.

What the Commission really has done is to say that they are bound upon the question of public necessity by the terms of the statute aforesaid. In other words, because Section 3157, *supra*, requires that a railroad should furnish track scales at all stations where the shipment of grain from such station had aggregated 50,000 bushels or more, the said Public Service Commission was bound to find a public necessity for such scales upon the showing that 50,000 or more bushels of grain had been shipped from Rich Hill, the year prior to the application made in this case. The evidence did show 50,000 or more bushels of grain for the previous year. But it is upon this theory as to the binding effect of Section 3157, alone, the Public Service Commission bases its finding as to public necessity. And upon such theory its order must stand or fall. The railway company urges that such statute has no binding effect, and this is the real question, which question we take next.

II. To my mind there is no question as to the power of the Public Service Commission to make an order for track scales. This power is contained in the

broad terms of Section 49 of the Public Service Commission Act. [Laws 1913, p. 588.] But this act requires the independent judgment of the Public Service Commission upon the facts before it, in the individual case, and without the influence or effect of any previous statute. In fact the whole act is expressive of a new theory of reaching results in matters pertaining to things to be done by public service corporations. It contemplates that orders may be made for things of public necessity or of public convenience in the transportation of either persons or property, but the act further contemplates that the question of public necessity or public convenience should be determined by the evidence in each particular case, and not by a previous statute which by its terms conflict with the Public Service Act.

The exact question, dealing with almost identical statutes, has been recently ruled by the Supreme Court of Illinois, in *State Public Utilities Commission ex rel. Baber v. Cleveland, C., C. & St. L. Ry. Co.*, 119 N. E. 310. That our Section 3157, Revised Statutes 1909, conflicts with our Public Service Commission Act is made so clear by CARTWRIGHT, J., in the Illinois case, *supra*, that we adopt that opinion as our own in this case. Among other things, the Illinois court says:

“The authority to enforce reasonable regulations for the weighing of grain and freight offered for shipment and to test the weights used in weighing freight on cars necessarily implies power to decide what regulations are reasonable and what they shall be. The law is that, if two statutes deal with the same subject-matter and are inconsistent with each other, so that both cannot be operative as to such subject-matter, the latter act will be regarded as a substitute for the former one and will operate as a repeal, although it contains no express repealing clause. A requirement that a carrier shall furnish track scales is a regulation in regard to weighing cars and the freight thereon. Section 2 of the Act of 1871, as amended in 1877, and

the Public Utilities Act, deal with the same subject; one classifying stations by the amount of grain shipped therefrom, and fixing a definite rule, subject to no choice, judgment, or discretion, and the other committing to the judgment of the Public Utilities Commission what will constitute a reasonable regulation. Section 2 requires the installation of track scales, whether in the judgment of the Commission such installation is reasonable or unreasonable, and Section 2, if in force, would restrict the power of the Commission to determine and enforce reasonable regulations. The one act leaves nothing to the judgment or discretion of the Commission, and the other commits everything to its discretion; so that the two are irreconcilable, and both cannot be in effect as to the same subject-matter. The judgment of the Public Utilities Commission might be that the requirement of track scales at a station like Dudley was reasonable or unreasonable, or that track scales should be furnished at stations where less than 50,000 bushels of grain are shipped in a year. Inasmuch as the two acts are irreconcilable, and relate to the same subject-matter, Section 2 was repealed by the Public Utilities Act."

The scope of the statutes in the two states are so similar, that further comment is unnecessary. A reference thereto is all that is required. We therefore hold that our said Section 3157 was repealed by our Public Service Commission Act, and the present order of our Public Service Commission which was based thereon, should be reversed.

Inasmuch as the circuit court affirmed the order, we will reverse the judgment of that court and remand the cause to be proceeded with as herein indicated. It is so ordered. All concur.

CITY OF FULTON, Appellant v. PUBLIC SERVICE
COMMISSION et al.

In Banc, June 13, 1918.

1. **PUBLIC SERVICE COMMISSION: Power to Fix Telephone Rates.**
The Public Service Commission has power by order to fix telephone charges at rates exceeding maximums prescribed in a franchise granted by a city ordinance to a telephone company prior to the enactment of the Public Service Act of 1913. Such an order does not impair the obligation of contracts evidenced by such ordinance. [Overruling *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, so far as conflictive.]
2. ———: ———: **Impairment of Individual Contracts: Police Power.**
All contracts made for individual subscribers by the city with a public service telephone company, through the medium of ordinances, are made in contemplation of the State's power to fix rates. Individuals cannot abridge the police power, but all such contracts are made subject to revision by an exercise of that power by the State, and its exercise does not impair the obligations of such individual subscribers.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*,
Judge.

AFFIRMED.

E. L. McCall and *A. T. Dumm* for appellant.

(1) The ordinance contract is an agreement upon charges for service—hence not to be considered as an ordinance “to fix” and determine the charges; a contract which cannot be impaired by a subsequent law of the State, fixing higher rates. The telephone company having received the benefits accruing to it, for a period of seventeen years, by the performance, on the part of the City of Fulton of its obligations under ordinance franchise contract, is now estopped from denying the validity of said contract. *State ex rel. City of St. Louis v. Gas Light Co.*, 102 Mo. 475. The Public Service Act from which the Commission claims

the power to raise the rates established in the contract, franchise, is directly in violation of Section Ten of Article One of the Constitution of the United States, and Section Fifteen, Article Two, of the Constitution of Missouri, as the impairment of the obligation of a contract. Said Ordinance is a valid and subsisting contract between the telephone company and the city. (2) The Public Service Act of 1913 cannot be upheld as against this plaintiff, as an exercise of the police power of sovereignty. Cooley's Const. Lim., star p. 577, and cases cited; St. Louis v. Gaslight Co., 70 Mo. 69; Dillon's Mun. Corp., sec. 303. The power to fix rates for the exercise of public franchise is a valid subject-matter of contract between the State and the person exercising such public function, and when it has once been regulated and fixed by contract, the State and its representative are bound by the terms of the contract so made. Stone v. Loan & Trust Co., 116 U. S. 307. A municipal assembly is a delegated agency of the State for purpose of local government. Within its lawful sphere its ordinances have the force of laws. It may also enter into contracts in pursuance of powers to that effect, and such contracts, when so made, are not subject to be impaired nor abrogated by subsequent laws against the will of the parties thereto. Springfield v. Railroad, 85 Mo. 674; City of Kansas v. Corrigan, 86 Mo. 67; City of California v. Bunceton Telephone Co., 112 Mo. App. 722. A contract between the State and a corporation created thereunder is formed in the grant and acceptance of the charter of corporate life and franchise; the acceptance of such charter completes its binding force and obligation upon the Legislature according to the terms thereof—and the Legislature cannot pass a law impairing the obligation of preexisting contracts—a *fortiori*. Cooley's Constitutional Limitations, p. 241; College v. Woodward, 4 Wheat. 518; Von Hoffman v. Quincy, 4 Wall. 430; Gas Co. v. Gas Co., 115 U. S. 683. Any act of either party to change the rates, would be impairing the obligation of a contract, and void; and the

City of Fulton v. Public Service Commission.

fact that said contract was made prior to the enactment of the Act of 1913 creating the Public Service Commission, places it under the protection of Section 15, Article 2, of the Constitution of Missouri. *St. Louis v. Gas Light Co.*, 70 Mo. 97-98; *Special Charter City of Fulton*, Session Laws 1859, p. 264; *Building Co. v. Tel. Co.*, 88 Mo. 272; *State ex rel. v. Roach*, 267 Mo. 317; *Cooley*, Const. Lim. (5 Ed.) 712.

Alex Z. Patterson, General Counsel and *James D. Lindsay*, Assistant Counsel, for Public Service Commission.

(1) The charter of the City of Fulton did not give it the power to fix rates for telephone service by an unalterable contract. The contract, effected by the passage of the ordinance and acceptance thereof, was entered into by the city and the company subject to the reserved right of the State to employ its police power to compel a change of rates when conditions should demand a change. *Benwood v. Public Serv. Commission*, 75 W. Va. 127, L. R. A. 1915C, 261; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, L. R. A. 1915C, 287; *City of Woodburn v. Public Service Commission*, 161 Pac. (Ore.) 391, L. R. A. 1917C, 98; *Yeatman v. Towers*, 126 Md. 513; *Dawson v. Dawson Telephone Company*, 137 Ga. 62; *North Wildwood v. Public Utility Commission*, 88 N. J. L. 81; *Kenosha v. Kenosha Home Telephone Company*, 149 Wis. 338; *Manitowoc v. Manitowoc & N. Traction Co.*, 145 Wis. 13; *Duluth Street Railway Company v. Railroad Commission*, 161 Wis. 245; *Pioneer Telegraph & Telephone Co. v. State*, 33 Okla. 724; *Marquis v. Polk Co. Telephone Co.*, 158 N. W. (Neb.) 927; *City of Emporia v. Emporia Telephone Company*, 88 Kan. 443, 90 Kan. 118; *Milwaukee Elec. R. & Lt. Co. v. Railroad Commission*, 238 U. S. 174; *Wyandotte Co. Gas Company v. State of Kansas*, 231 U. S. 622; *Home Telegraph & Telephone Company v. Los Angeles*, 211 U. S. 265; *Stanilaus County v. San Joaquin Co.*, 192 U. S. 201; *Freeport Water Company v. Freeport City*, 180 U. S.

587; *Rogers Park Water Company v. Fergus*, 180 U. S. 624. (2) Corporations created by the State for public service or for governmental purposes, cannot, by contracts upon subjects within the regulatory and restrictive powers of the State, remove those subjects from the dominion of the State. The contract carries with it the infirmity of the subject-matter. *State ex rel. Wabash Railway Company v. Public Service Commission*, 271 Mo. 270; *Tobacco Company v. St. Louis*, 247 Mo. 374; *Duluth Street Railroad Company v. Railroad Commission*, 161 Wis. 245; *Louisville & Nashville Railroad Company v. Mottley*, 219 U. S. 467; *Yeatman v. Towers*, 126 Md. 513; *Portland Railway, L. & P. Co. v. Railway Commission*, 229 U. S. 397; *Railroad v. Minneapolis*, 232 U. S. 430. (3) Authority to fix rates of public service corporations is a legislative function and prerogative of the State, and a surrender of this sovereign right can be found to have been made only by virtue of a grant so absolute, and unequivocal in its terms that no doubt can be entertained as to its meaning. *Milwaukee Elec. R. & Light Co. v. Railroad Commission*, 238 U. S. 174; *Home Telephone & Teleg. Co. v. Los Angeles*, 211 U. S. 265; *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, l. c. 266; *Stanilaus v. San Joaquin etc. Co.*, 192 U. S. 201, 210; *Freeport Water Co. v. City of Freeport*, 180 U. S. 587. (4) Municipal corporations possess and can exercise only such powers: (a) as are granted to them in express words, or (b) are necessarily or fairly implied in or incident to the powers expressly granted, or (c) are essential to the declared purposes of the corporation, not simply convenient, but indispensable. *City of St. Louis v. Bell Telephone Company*, 96 Mo. 628; 1 Dillon, *Municipal Corporations* (3 Ed.), sec. 89. (5) The City of Fulton, under its charter, had no power: (a) To fix rates by compulsion. *State ex rel. Garner v. Tel. Co.*, 189 Mo. 83; *Union Electric L. & P. Co. v. St. Louis*, 253 Mo. 592; *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623. (b) To fix, by contract, rates for an in-

City of Fulton v. Public Service Commission.

determinate period, such authority being neither expressly granted, nor necessarily implied, nor indispensable. Section 10, Charter of City of Fulton, Laws 1859, pp. 263-4-5; *Benwood v. Public Service Commission*, L. R. A. 1915C, 261.

BLAIR, J. —The city appeals from an affirmance of an order of the Public Service Commission fixing telephone charges at rates exceeding maximums prescribed in a franchise granted by city ordinance in 1900 to the telephone company. It is stipulated that the only question involved is "the authority of the Public Service Commission of Missouri to order an increase of telephone rates and charges over the rates and charges provided for in Ordinance No. 62 of the City of Fulton." Relator's contention is that the order of the Commission impairs the obligation of the contract evidenced by the ordinance mentioned.

The question was decided in *State ex rel. Sedalia v. Public Service Commission*, 275 Mo. 201, and we adopt the ruling there made. The suggestion that the rights of individual subscribers are involved is answered by the rule that individuals cannot abridge the police power by contracts made under an ordinance subject to revision under that power. [*Knoxville Water Co. v. Knoxville*, 189 U. S. 434.] All such contracts necessarily are made in contemplation of the State's power to fix rates. This disposes of the idea that the revision of rates impairs the obligation of contracts.

In view of what is written in the *Sedalia* case it is necessary to overrule *State ex rel. St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, in so far as it conflicts with that decision. The result in that case was right on other grounds, as the record shows. *Sloan v. Railroad*, 61 Mo. 24, is not necessarily in conflict with the conclusion in the *Sedalia* case. The *Sloan* case was based upon legislation enacted prior to the adoption of the Constitution of 1875.

The judgment is affirmed. All concur.

THE STATE ex rel. CHICAGO & ALTON RAIL-
WAY COMPANY v. PUBLIC SERVICE COM-
MISSION et al.

In Banc, June 13, 1918.

1. **RAILROADS: Signal Crossings and Gates: Do Not Include Interlocking Plant.** A contract made by a railroad company which was about to construct its tracks across those of an existing railroad belonging to another company, by which the junior company agreed to pay the entire costs of "crossing-signals or gates" thereafter at any time necessary to be erected and maintained, is not an agreement to pay the costs of erecting an "interlocking plant" at the crossing, since the words "crossing signals or gates" do not include an "interlocking plant;" and hence an order of the Public Service Commission, made upon the petition of the junior company, directing the installation of an interlocking plant and requiring the older company to pay a part of the cost, does not impair the obligation of such contract.
2. ———: **Interlocking Plant: Apportionment of Costs: Train Basis: Unreasonable Order.** Although the portion of the costs of erecting and maintaining an interlocking plant apportioned to appellant is somewhat too large if based alone on the average number of trains of each of two railroads daily passing the crossing, yet if the evidence before the Public Service Commission reveals that at least two items were considered in arriving at the apportionment, namely, economy of crossing operation and safety, and the evidence concerning the proper items to be considered in apportioning the costs was not fully developed, and a true solution will of necessity depend upon many items not disclosed, the court will not rule that the apportionment made by the Commission was unreasonable.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

AFFIRMED.

Charles M. Miller for appellant.

(1) The Public Service Commission erred in apportioning, under the contract between the two railroad companies, any part of the cost of construction,

operation, and maintenance, of the interlocking plant against the Alton Company, and the circuit court also erred in affirming the order of the Public Service Commission. *Caldwell v. Layton*, 44 Mo. 220; *Bradshaw v. Bradbury*, 64 Mo. 334; *Pavey v. Burch*, 3 Mo. 447; *Davis & Rankin v. Hendrix*, 59 Mo. App. 444; *County of Johnson v. Wood*, 84 Mo. 489; *Carney v. Chillicothe W. & L. Co.*, 76 Mo. App. 536; *Sachleben v. Wolfe*, 61 Mo. App. 28; *Stock Food Co. v. Bridges*, 160 Mo. App. 122; *Belch v. Miller*, 32 Mo. 387; *Lumber Co. v. Dent*, 151 Mo. App. 614; *Patterson v. Camden*, 25 Mo. 13; *Leonard v. C. & A. Ry. Co.*, 54 Mo. App. 293. (2) The order of the Public Service Commission impairs the contract between the two railroad companies and takes its property without due process of law, contrary to Sections 15 and 30 of Article 2 of the Constitution of Missouri, and Section 1, Article 14, of the Amendments to the Constitution of the United States.

J. W. Jamison for respondent, Missouri, Kansas & Texas Railway Company.

(1) The proposed interlocking plant at the crossing of the two lines of railroad, consisting of numerous switches, derails, facing point locks, home signals and dwarf signals, with pipe connections mounted on anti-friction pipe carriers, the turns and angles in the pipe line to be made with rocker shafts, deflecting bars and cranks; pipe carriers to be of concrete equipped with iron tops; dwarf signals, home signals and electric distant signals to be mounted on iron masts; all signals to be mounted on well-designed, substantial concrete foundations; tract battery and signal battery to be housed in substantial concrete battery boxes; the tower for housing of the interlocking machine to be two stories high; tower to be made of monolithic concrete construction, etc.; interlocking machine to be located in the second story, etc., was not a "crossing signal" "within the meaning of the old contract between the M. K. & T. Railway Company and appellant.

State ex rel. C. & A. Ry. Co. v. Public Service Com.

Grand Trunk Ry. v. Indiana Railroad Comm., 221 U. S. 400. (2) The order of the Public Service Commission, ordering the interlocker, and apportioning the cost thereof on an equitable basis as between the two lines of railroad, does not impair the provisions of the contract relied on by appellant, nor does it take appellant's property without due process of law, contrary to any provision of the Constitution of Missouri, or of the Federal Constitution. State ex rel. M. K. & T. Ry. v. Public Service Comm., 221 Mo. 270; State ex rel. Wabash v. Public Service Comm., 271 Mo. 270; Tranbarger v. Chichago & Alton Ry. Co., 250 Mo. 46; Chichago & Alton Ry. Co. v. Tranbarger, 238 U. S. 67.

Alex Z. Patterson, General Counsel, *James D. Lindsay*, Assistant Counsel for respondent, Public Service Commission.

(1) The Public Service Commission has complete and exclusive power to prescribe the manner of crossing of one railroad by another railroad, and to require the installation, operation and maintenance of appropriate safety and other devices and appliances, including interlocking plants by railroads, and to determine and apportion the cost thereof. Sections 50 and 116, Public Service Act; State ex rel. M., K. & T. Ry. Co. v. Public Service Commission, 271 Mo. 270. (2) The power to require the installation of an interlocking plant at the crossing of one railroad by another railroad, and to apportion the cost between them, in an exercise of the delegated legislative power, which is independent of and unhampered by contracts between the companies concerned. It is compulsive and coercive in its nature, and in no wise contractual. State ex rel. M., K. & T. Ry. v. Public Service Commission, 271 Mo. 270; Grand Trunk Ry. v. Indiana Railroad Commission, 221 U. S. 400; Railroad v. Minneapolis, 232 U. S. 430; American Tobacco Co. v. St. Louis, 247 Mo. 433; Northern Pacific Railway v. Duluth, 208 U. S. 583. (3) The subject-matter of the contract upon

which appellant relies, is one of a public nature and of public service. By the Public Service Commission Act, it has been withdrawn from the possession and power of the railroad companies as a subject they may control by a contract between themselves. The contract, not having been executed by the parties before the State chose to act in the premises, has no longer a legal existence. The subject-matter of it has been destroyed by the Public Service Act. Therefore, it is unenforceable. *L. & N. Railway Company v. Mottley*, 219 U. S. 467. (4) The Legislature gave to the Public Service Commission exclusive jurisdiction over the entire subject of railroad crossings and construction of interlockers, but gave it no jurisdiction whatever to consider, to construe or to enforce contracts in respect of that subject, and a legislative attempt to grant the last named power would have been unconstitutional and futile. *Lusk v. Atkinson*, 268 Mo. 109; *State ex rel. Mo. South R. R. Co. v. Public Service Com.*, 259 Mo. 704. (5) The order does not impair the obligation of the contract between the two companies, nor take appellant's property without due process of law in violation of any provision of State or Federal Constitution, because: (a) The order concerns the public safety, and the power of the State over that subject cannot be limited by the contracts of private interests on the same subject. (b) The obligation has failed by reason of this infirmity of subject-matter and of parties. (c) The contract was entered into subject to the unabridged police power of the State, peculiarly applicable to the subject in hand—the crossing of two public highways. (d) The obligation of such contract was conditional and could not extend to the defeat of or inference with, action by the State, on that subject. *State ex rel. M. K. & T. Ry. v. Public Service Commission*, 271 Mo. 270; *Grand Trunk Ry. Co. v. Indiana Commission*, 221 U. S. 400; *Louis. & Nash. R. R. Co. v. Mottley*, 219 U. S. 467; *Milwaukee Elec. Ry. & L. Co. v. Commission*, 238 U. S. 174; *Mo. Pac. Ry. Co. v. Omaha*, 235 U. S. 121; *North. Pac. Ry. v. Duluth*, 208 U. S. 583;

Addyston Pipe & Steel Co. v. United States, 175 U. S. 229; Scranton v. Wheeler, 179 U. S. 162; Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 202; Atlantic Coast Line R. R. Co. v. City of Goldsboro, 232 U. S. 558.

WILLIAMS, J.—The proceeding which forms the basis of this review was originally instituted before the Public Service Commission by the Missouri, Kansas & Texas Railway Company, wherein the Public Service Commission was asked to make an order requiring the construction of an interlocking plant at the crossing at North Jefferson, Missouri, of the tracks of the Missouri, Kansas and Texas Railway Company and of the Chicago & Alton Railway Company, and further that the Commission apportion the cost of construction, maintenance and operation of said interlocking plant between the two railway companies. After a hearing, the Public Service Commission ordered an installation of the interlocking plant, the estimated cost of which was \$9624, and ordered that the cost of construction, together with the cost of maintenance and upkeep, be appropriated as follows:

To the Missouri, Kansas & Texas Railway Company, 71.4% thereof; to the Chicago & Alton Railway Company 28.6% thereof.

Upon *certiorari*, at the instance of the Chicago & Alton Railway Company, the order of the Public Service Commission was reviewed and affirmed by the circuit court of Cole County. Thereupon the Chicago & Alton Railway Company appealed to this court.

In its answer before the Commission the Chicago & Alton Railway Company, hereinafter referred to as the appellant, alleged that by virtue of a certain written contract entered into by and between itself and the predecessor of the Missouri, Kansas & Texas Railway Company, the sole cost of construction, maintenance and operation of the interlocking plant should be assessed against the Missouri, Kansas & Texas Railway Company; that to do otherwise would be to im-

pair the obligation of said contract and to take appellant's property without due process of law, all contrary to certain specified sections of both the State and Federal Constitutions.

It appears from the evidence that the appellant is the senior company and was operating a railroad at this point at the time the crossing contract in question was executed in 1892. Those sections of the contract here involved are as follows:

"Third. The said party of the second part [the predecessor of the M. K. & T. Ry. Co.] agrees that it will furnish the materials for and construct and put in all crossing-frogs, crossing-signals, gates and targets and other fixtures necessary to make the crossing with the existing tracks of the party of the first part [appellant herein] at the points aforesaid strictly in accordance with such plans and specifications as shall be prescribed by the chief engineer of the party of the first part, and that the said party of the second part will, at its sole cost and charge, forever maintain and keep in good repair, and renew, from time to time when necessary, all the crossing-frogs, crossing-signals, gates and targets and other fixtures provided for in this indenture, whether of existing tracks or of such as may be hereafter laid by the party of the first part, all in such manner as shall be satisfactory to the said party of the first part. In the event that it does not make all such repairs or renewals when reasonably required so to do, the party of the first part may make the same, and the party of the second part agrees that it will promptly pay the party of the first part the full cost thereof.

"Fourth. *If, at any time hereafter, the business of the party of the first part, or the laws of the State of Missouri or the ordinances of any municipal corporation of said State, shall make it necessary to station flagmen at the said crossings, or shall make it necessary or proper to erect crossing-signals or gates thereat, said party of the first part shall have the right to employ such flagmen and to establish such signals and*

gates, and the said party of the second part will pay the wages of such flagman or flagmen promptly as the same become due from time to time and the cost of the construction, maintenance and operation of such signals or gates. Any such flagman or flagmen shall be appointed by said party of the first part, but subject to the approval of the general superintendent or other managing officer of the party of the second part, and the said party of the second part shall have the right to require the discharge of such flagman or flagmen if there be good and sufficient reasons therefor, to be determined by its general superintendent or other proper managing officer, who shall state such reason in writing to the party of the first part, if required."

Upon the hearing, blue print maps and diagrams of the proposed interlocking plant, together with the engineer's estimate of the cost thereof, were introduced in evidence. No issue is raised as to the merits of the plant which was ordered installed. The evidence shows that this system, to-wit, the Saxby & Farmer Interlocking System, has been in use for about thirty years, how extensively is now shown. It also appears from the evidence that an interlocking system is a greater instrumentality of safety than the method of having gates at crossings or the law requiring trains to stop before passing over crossings; that methods other than the interlocking system depended more upon the human agency; that sometimes engineers in approaching crossings forget to bring their engines in under control, or the gateman sometimes forget to operate the gates, and that sometimes collisions occur at railway crossings; that the mechanism of the interlocking plant is such that when one track is made clear for traffic, derailing switches in the other crossing tracks are automatically operated, thereby making it impossible for trains to meet at such crossings; that the installation of an interlocking plant insures a safe operation of trains at the crossing point. The evidence further tends to show that the interlocking plant is justifiable as a matter of economy. That the cost of carrying the interlocking

investment is less than cost of the train stops required at such points where an interlocking plant is not installed.

Mr. Harrop, the chief engineer of the Public Service Commission, testified that the usual method of apportioning the cost of interlocking plants as promulgated by rule of the Railway Signal Association was upon what is known as the function or unit basis; "that is the number of signals, derails, etc., on different tracks are the units that are made the basis for the apportionment of the cost between the companies."

This witness further testified that the situation at the North Jefferson crossing was such as to require more derails in appellant's tracks than in the tracks of the Missouri, Kansas & Texas Railway. This witness in applying the function basis to the apportionment of the cost stated that it would place against the appellant 57.9% and against the M., K. & T. Ry. Co., 42.1%. This witness further stated that the usual practice in dividing the cost of operation was to divide it equally between the two companies. Mr. W. E. Williams, the general manager of the M., K. & T. Ry. Co., corroborated the testimony of Mr. Harrop as to the usual basis of apportioning the costs of construction and maintenance of an interlocking plant.

The evidence further shows that the M., K. & T. Railway Company averaged sixteen trains per day, and the appellant six trains per day over this crossing; that it was the main line of the M., K. & T. Railway Company, but the branch line of the appellant; that the trains operated over the crossing by the M., K. & T. Railway Company were much longer and heavier than the trains operated by the appellant; that all of the appellant's trains stopped at this crossing for the purpose of taking on or receiving passengers or freight from the connecting line; that the trains of both railroads usually stood on the crossing while unloading passengers and freight at this point; that many of the M., K. & T. trains were through trains and would not

stop at this crossing, but for the state law requiring them to so stop; that an interlocking plant would in many instances remove the necessity of stopping trains before going upon the crossing.

Further necessary reference to evidence will be made in the course of the opinion.

I. Appellant contends that the order of the Public Service Commission in imposing upon it a part of the cost of the construction, maintenance and operation of the interlocking plant impairs the obligation of the crossing contract executed in 1892.

In determining the question it is essential that we first examine the contract to see if it places an obligation for the payment of the cost of the construction, maintenance or operation of an interlocking plant. If it does not, then it necessarily follows that the order of the Commission apportioning such cost does not impair any obligation of such contract.

The contract provides: "If, at any time hereafter, the business of the party of the first part [appellant], or the laws of the State of Missouri or the ordinances of any municipal corporation of said State, shall make it necessary to station flagmen at said crossings, or shall make it necessary or proper to erect *crossing-signals or gates* thereat, said party of the first part shall have the right to employ such flagmen and to establish such *signals and gates*, and the said party of the second part will pay the wages of such flagman or flagmen promptly as the same become due from time to time and the cost of the construction, maintenance and operation of such *signals and gates*." (Italics ours.)

If the term "interlocking plant" is included in the above contract it must be included within the phrase "crossing signals or gates."

We have reached the conclusion that the phrase "crossing signals or gates" as used in the contract can in no proper manner be construed to include "interlocking plants."

This exact point, or at least a point so closely analogous to the one here involved as to supply a valuable precedent in the instant case, was passed upon by the Supreme Court of the United States in the case of Grand Trunk Western Railway Company v. Railroad Commission of Indiana, 221 U. S. 400. In that case in construing a very similar contract the court said:

"The contract is set forth at length in the State court's opinion and need not be reproduced here. It declares explicitly that the duty of constructing and properly maintaining the physical crossing of the two roads and bearing the expense incident thereto, shall rest with the junior road, but its only provision respecting what shall be done in the way of guarding the crossing is that 'good and substantial semaphores or other signals, and . . . the requisite watchmen to take charge of and operate the same,' shall be provided and maintained by that road at its 'individual expense.' There is no reference to an interlocking plant, nor any general language that would include one. The words 'semaphores or other signals' do not do so. An interlocking plant is so much more than a signaling device that it is quite beyond their usual meaning."

Since the contract does not cover the expense imposed it is unnecessary to a determination of this case to decide whether the Public Service Commission in the exercise of the police power of the State can apportion a railway crossing expense contrary to the express terms of a contract. For that reason the latter point is not here further discussed.

II. Appellant makes the further contention that even though the contract be held not to control the situation, yet the order of the Commission, in imposing 28.6% of the cost upon the appellant, is unreasonable and unjust.

Upon the hearing appellant did not offer any evidence concerning the proper items to be considered in apportioning the costs of an interlocking plant. In

its brief it says: "The conditions vary so in crossings that no rule can be established which would be uniform and just."

The only evidence in the record tending to give a basis for apportionment of such expenses (that offered by the respondent company) would, if applied, fix the amount against appellant at 57.9% of the cost of construction and maintenance and 50% of the cost of operation. The order of the Commission apportioned only 28.6% against appellant.

The Commission evidently undertook to apportion the expense on the train basis; e. g., each railway company was assessed an amount in proportion to its share of the average total number of trains using the crossing. In this way the smaller percentage of cost (appellant having the smaller number of trains using the crossing) was assessed against appellant. The respondent railway company, against whom the larger assessment was laid, makes no complaint, so we have not to deal with the larger question of whether the train basis is the proper basis, but only with the question as to whether the order as applied to appellant was unreasonable. Appellant contends that even though the train basis be the proper one, yet the amount assessed against it is too much; that appellant's proportion as fixed by the Commission is erroneous, because in arriving at the percentage the respondent railway company was charged with an average of only fifteen trains per day while the testimony shows the number to be sixteen.

The testimony before the Commission does show that the Missouri, Kansas, and Texas Railway Company averaged sixteen trains daily over this crossing, and if the apportionment was to be determined on the train basis alone it would appear that appellant was assessed approximately \$125 too much. But must the apportionment be based upon the train basis alone? There is no basis in this record for such a conclusion. While this record does not fully develop the different items that might be considered in arriving at a proper

basis, yet two items are mentioned, to-wit, (1) economy of crossing operation and (2) safety.

As to the item of economy of operating trains over the crossing it appears from the evidence that by the use of an interlocking plant many trains would be permitted to use the crossing without coming to a stop, as is required under present conditions, thereby saving the cost of stops thus eliminated. If this were the only item it would not perhaps be unjust to apportion the costs to each railroad in the proportion which the amount of money thus saved bore to the total amount thus saved by both railroads.

But can the same be said as to the second item, e. g., safety? It would be difficult to conceive of a collision at the crossing of two railroads unless both railway companies participated therein; that is to say, every time a collision occurs at such a crossing each railway company would have a train or part of a train involved. This being true it would appear that so far as this item is concerned each railroad would share equally in the financial saving resulting from the elimination of crossing collisions.

Without here undertaking to state the true basis for such an apportionment (this because the true solution would no doubt depend upon many items not disclosed by this record, and upon facts the existence of which lie without the range of judicial knowledge) we feel no hesitancy in stating that the present record supplies appellant with no proper basis for complaint.

The judgment is affirmed. All concur.

JOHN C. CARTER, Administrator of Estate of DELMAR RIDGEWAY, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

In Banc, June 28, 1918.

1. **LIFE INSURANCE: Misrepresentation Statute: Simulated Applicant.** The statute (Sec. 6937, R. S. 1909) declaring that "no representation made in obtaining or securing a policy of insurance on the life" of any citizen of this State "shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable," does not apply to a policy procured by one simulating the applicant. The statute was designed to lessen fraud, not to increase it.
2. ———: ———: ———: **Interpretation.** The words of the statute limit the misrepresentations (1) to those expressed in the application "made in obtaining and securing" a valid policy, and (2) to matters which "actually contributed" to the insured's death. It does not render immaterial a concealed condition which, had it been made known at the time of the applicant's examination, would have precluded the issuance of the policy.
3. ———: **Fraudulent Contract.** A policy of life insurance, issued upon an application made by one who personated the applicant, having been conceived in fraud, may, for that reason, in an action on the policy, be shown to be fraudulent and therefore invalid.
4. ———: ———: **Pleading: General Denial.** If nothing appears on the face of the petition to disclose the fraud on which the insurance contract was founded, and said contract is susceptible of formal proof without a showing as to its legality, the defense that no legal contract was made is not available under a general denial, but, to be available, the facts constituting its invalidity must be pleaded.
5. ———: ———: ———: **Joinder of General Denial With Special Defenses.** The joinder of a general denial, separately stated, with a special answer and cross-bill is expressly authorized by statute.
6. ———: ———: ———: **Cancellation: Conversion Into Equity.** If the special answer and cross-bill aver with sufficient certainty the invalidity of the contract sued on, and the cross-bill, after stating proper grounds for affirmative relief, contains a prayer for the cancellation of the contract, the action at law is thereby converted into one in equity, and the case is to be heard by the court and not by a jury.

Carter v. Insurance Co.

APPEAL from St. Louis City Circuit Court.—*Hon. Kent K. Koerner, Judge.*

REVERSED AND REMANDED (*with directions.*)

Fordyce, Holliday & White for appellant; *William J. Tully*, of counsel.

(1) The court erred in sustaining plaintiff's demurrer to defendant's cross-bill. The averments of the cross-bill stated a cause of action in equity, based upon the fraudulent conduct of the plaintiff, and, if true, established conclusively that no valid contract of insurance had ever been entered into and that the policy on which plaintiff was suing should be canceled. *Barrington v. Ryan*, 88 Mo. App. 95; *Whitmore v. Supreme Lodge*, 100 Mo. 46; *Pacific Mutual v. Glaser*, 245 Mo. 390; *Gardner v. North State Co.*, 163 N. C. 307; *Southern States Co. v. Herlihy*, 128 S. W. 94; *Mutual Life v. Pearson*, 114 Fed. 395; *Bacon, Life & Accident Insurance* (4 Ed.), sec. 194; 1 *Joyce on Insurance* (2 Ed.), secs. 99, 43-45; *Schuermann v. Ins. Co.*, 165 Mo. 649; *Keller v. Insurance Co.*, 198 Mo. 455; 9 Cyc. 401. (2) The court erred in overruling the defendant's objection to trial by jury. Sec. 1807, R. S. 1909; *Wendover v. Baker*, 121 Mo. 273; *Myers v. Schuchmann*, 182 Mo. 159. (3) The court erred in ruling that the defendant under its general denial, was not entitled to introduce evidence to prove that no contract of insurance was ever entered into between *Delmar Ridgeway* and the defendant. *Greenway v. James*, 34 Mo. 328; *Cavender v. Waddingham*, 2 Mo. App. 551; *Wilkerson v. Farnham*, 82 Mo. 672; *Clemens v. Knox*, 31 Mo. App. 185; *White v. Middlesworth*, 42 Mo. App. 373; *Chapman v. Currie*, 51 Mo. App. 40; *Hellmuth v. Benoist*, 144 Mo. App. 698; *Southern States Co. v. Herlihy*, 128 S. W. 94; *Johnson v. Insurance Co.*, 181 Mo. App. 443; *Young v. Glascock*, 79 Mo. 576; *Sprague v. Rooney*, 104 Mo. 360.

Frederick H. Bacon for respondent.

(1) Before a loss, but not afterwards, an insurance company can bring an action in equity to cancel a policy alleged to have been obtained by fraud. After the death, however, no such right exists because the fraud, if any, can be pleaded as a defense, provided the facts bring it within the provisions of our statute as to misrepresentations made in obtaining a policy of life insurance; consequently the defendant in such case has a complete and perfect remedy at law. *Schuermann v. Union Central Life Ins. Co.*, 165 Mo. 652; *Kern v. American Legion of Honor*, 167 Mo. 471-488; *Pacific Mutual Life Ins. Co. v. Glaser*, 245 Mo. 377; *Insurance Co. v. Cullen*, 237 Mo. 557; *Keller v. Home Life Ins. Co.*, 198 Mo. 440-453; *Lynch v. Prudential Ins. Co.*, 150 Mo. App. 461; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288; *Riggs v. Union Life Ins. Co.*, 63 C. C. C. 365, 129 Fed. 207; *Griesa v. Mutual Life Ins. Co.*, 94 C. C. A. 635, 109 Fed. 509. (2) The sustaining of the demurrer to the cross-petition of appellant was practically a judgment. The cross-petition is really a new suit and when a demurrer is sustained to the cross-petition the same result follows as if a demurrer had been sustained to a petition, and the defendant must either abandon his cross-petition, leaving judgment to be rendered on the demurrer, or file an amended cross-petition. The matter which was demurred to as an answer and cross-petition can no longer be considered, nor can it be considered as an answer to the allegations of the petition. If defendant wishes to avail himself of them he must file an answer setting up the facts, because the sustaining of the demurrer eliminates the allegations of the cross-petition. *Sec. 1811, R. S. 1909*; *Cardwell v. Stuart*, 92 Mo. App. 586. (3) After the demurrer to the cross-petition was sustained, the only pleading of the defendant remaining was the general denial. If the defendant claimed that the issuance of the policy was obtained by fraud, the facts must be specially pleaded. *Kern v.*

Carter v. Insurance Co.

Legion of Honor, 167 Mo. 471; Welsh v. Ins. Co., 165 Mo. App. 233; Aloe v. Life Assn., 164 Mo. 675; Jenkins v. Ins. Co., 171 Mo. 383; Keller v. Ins. Co., 198 Mo. 440; Kelerher v. Henderson, 203 Mo. 498-511; State ex rel. v. Kennedy, 163 Mo. 518; 2 Cooley's Briefs, 1176; Hilburn v. Ins. Co., 140 Mo. App. 365; Burgess v. Ins. Co., 114 Mo. App. 189.

WALKER, J.—This is an action brought by plaintiff as administrator on a life insurance policy, alleged to have been issued by defendant to one Delmar Ridgeway. Upon the sustaining of a demurrer to defendant's answer, except as to its general denial, and its refusal to plead further, the plaintiff made formal proof and the court directed a verdict in his favor in the amount of the policy. From this judgment the defendant appeals.

The petition contains all the formal averments necessary to a pleading of this character.

The answer consists, first, of a general denial; second, a special defense, and cross-bill, that the policy was caused to be issued on the application of a person who falsely represented himself to be Delmar Ridgeway, and that defendant issued said policy relying upon such false and fraudulent representation; that the person who represented himself to be Delmar Ridgeway, and who signed the application for the policy, was not in fact Delmar Ridgeway, but fraudulently imposed upon the defendant in thus falsely representing himself in the procurement of said policy.

That the plaintiff, with intent to defraud the defendant, caused the alleged Delmar Ridgeway to apply for the policy and to undergo the required medical examination therefor, and furnished the money to pay the premium on the policy; that plaintiff fraudulently caused the alleged Delmar Ridgeway to execute a will purporting to be the will of Delmar Ridgeway, bequeathing the policy to the plaintiff. That five months after the issuance of the policy, Delmar Ridgeway died and plaintiff made application for and

was appointed administrator, with the will annexed, of the estate of the deceased.

For a further special defense and cross-bill, after pleading the foregoing affirmative defenses, defendant alleges that the application for insurance herein was not made in good faith by the alleged Delmar Ridgeway, for the beneficiary named in the policy, but was made at the instigation and request of the plaintiff for his own use and benefit. That plaintiff paid the first semi-annual premium on the policy, and caused the alleged Delmar Ridgeway to execute a will bequeathing the policy to the plaintiff. That the policy never was delivered to the alleged Delmar Ridgeway, but possession of same was fraudulently kept and maintained by the plaintiff, and the plaintiff had no insurable interest in the life of the insured.

This is followed by a prayer for specific relief in that the policy be canceled, and for naught held, and that defendant be hence dismissed with its costs and for such other and further relief as to the court may seem proper.

Plaintiff's demurrer to the first and second counts of the answer, stated separately, was that neither constituted a defense to the petition, and if the facts stated therein were true, they showed that defendant had a full and complete remedy at law.

The case coming on for hearing, after the sustaining of the demurrer, as aforesaid, the plaintiff made formal proof of the issuance of the policy, the payment of the premium, the death of deceased, the probating of the will of the latter, and the appointment of plaintiff as administrator. The defendant offered proof to sustain its general denial, and in support of its several special defenses, all of which testimony was excluded.

The matter having been heard before a jury, the court, at the instance of the plaintiff, gave the following peremptory instruction:

"The court instructs the jury that under the pleadings and evidence in this case the plaintiff is en-

titled to recover on the policy sued on in the sum of five hundred dollars, less an unpaid semi-annual premium of \$10.91, with interest on the balance from the time of the filing this suit, at the rate of six per cent."

Defendant asked the following instructions, which were refused:

"The court instructs the jury that if you believe and find from the evidence that the application for the policy in this suit was not signed by Delmar Ridgeway, but, on the contrary, was signed by some other person, falsely and fraudulently representing himself to be Delmar Ridgeway, and that this fact was not known to the defendant, then your verdict must be in favor of the defendant.

"The court instructs the jury that if you believe and find from the evidence that the plaintiff John C. Carter caused an application to be made for a policy of insurance purporting to be upon the life of one Delmar Ridgeway and that the plaintiff caused an alleged Delmar Ridgeway to execute a last will and testament leaving the proceeds of said policy to the plaintiff and that the plaintiff was not a relative of said Delmar Ridgeway or dependent upon said Delmar Ridgeway or a creditor of said Delmar Ridgeway and had no insurable interest in the life of said Delmar Ridgeway, then your verdict must be in favor of defendant."

The jury found in favor of the plaintiff, as directed by the court. From this verdict, after the overruling of its motion for a new trial, defendant appealed.

I. Primarily, the determination of the issue involved is dependent upon the construction of Section 6937, Revised Statutes 1909, which provides: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this State, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and

**Simulated
Applicant.**

whether it so contributed in any case shall be a question for the jury."

Plaintiff contends, and the trial court so held, that this section applies not only to policies procured through misrepresentations made by the applicant for insurance, but as well to those procured by one simulating the applicant. This is a rather startling proposition, and if the statute be so construed, its effect will be to render an insurance contract immune from a plea of invalidity for fraud, although obtained through false pretenses made by another than the insured, and without his knowledge. No amplification of words is necessary to the conclusion that such a construction, instead of lessening the possibility of fraud, as was evidently intended by the enactment of the section, will tend rather to promote the same. Aside, however, from this general conclusion, amply sustained by the rules of interpretation, a consideration of the nature of life insurance contracts and the conditions under which they are uniformly executed, will aid in determining the meaning, purpose, and consequent limitation of the section.

An examination of the applicant is a condition precedent to the issuance of a life insurance policy. From its terms, it is evident that this section was intended to be limited to the facts elicited in this examination in its providing that the misrepresentations referred to shall be those "made in obtaining or securing" the policy. The limitation is express, and under the rule embodied in the maxim of *expressio unius*, etc., other misrepresentations outside of or independent of such examination and which may affect the validity of the policy are excluded.

Viewed from another vantage the propriety of the restricted application of the section becomes apparent. It is in the nature of a limitation. As such, it can have no operative force unless there exists a policy otherwise valid upon which it can operate. An invalid policy has no legal existence and can form no basis for the operation of a limitation. As applied to the case at bar, it fol-

lows that before the section can be invoked to limit the effect of whatever misrepresentations may be pleaded as a defense to an action on the policy, the latter must be conceded to be otherwise valid. The result of this concession leaves nothing which can appropriately be interposed by the plaintiff in invoking the section, except such misrepresentations as may be charged to have been made by the insured in obtaining the policy; these, as we have shown, must be such as were made by him in his examination for the same.

Furthermore, the words employed in defining the materiality of the misrepresentations referred to in the section, are, in themselves, sufficiently definite to enable the character of such misrepresentations to be determined. The section prescribes that only such misrepresentations are material as contribute to the death of the insured; one which so contributes must be such an one, which, if it had not been made, the policy would not have been issued. To illustrate, the applicant answers falsely in regard to never having had a certain disease and that he is then in sound health. He dies soon thereafter of this disease. If he had answered truly, the issuance of the policy would have been precluded. False answers to any other material inquiries would have had a like effect in that they would have rendered the applicant an uninsurable risk. This but tends to emphasize the fact that the right of the insured to the policy is determined by his examination, and to such misrepresentations, therefore, as are made therein, the section must necessarily have reference. What is meant by the section, in other words, is that no false statement made in the application for the policy shall avoid the same unless such statement concealed a condition which contributed to the death of the insured.

Otherwise construed, the validity of the policy in other respects is left out of consideration. No limit, except as indicated in defining their materiality, is to be placed upon any representations made in securing the policy; and, although they may involve the grossest

and most despicable fraud, viz., the impersonation of another for the purpose of profiting by his death, and be independent and outside of the purported examination of the insured, the insurer is to be precluded from interposing them in defense to an action on the policy, unless it be alleged that they contributed to the death of the insured.

Such a construction is not in accord with a reasonable interpretation of the words employed. Its effect in the administration of the law of insurance under our statute would be to foster fraud. It outrages a righteous sense of justice and is, therefore, foreign to the intention of the Legislature in the enactment of the section. Given the restricted construction we have indicated, however, it serves a useful and practical purpose in placing a reasonable limit upon the effect of misrepresentations the interposition of which has been deferred until the insured is dead.

The construction of the section under the facts in issue is one of first impression in this State. Our reports are replete with cases discussing and determining the effect of various forms of misrepresentations in obtaining policies, but these are found to be limited to misrepresentations made by the applicants themselves and not by others.

The Supreme Court of Kentucky, in ruling upon a case (*So. States Mutual Life Ins. Co. v. Herlihy*, 138 Ky. 359, 128 S. W. 91) involving the defense made here of false personation of the insured in procuring the policy, says, in effect, that "although the company could not defeat a recovery upon the ground that the insured in the application made false and material answers, this did not deprive it of the right to show that the insured was not the person who made application for the insurance and who was, in fact examined; or that the insurance was procured as a part of a conspiracy between the insured and others who had no insurable interest in her life for the purpose of practicing a fraud upon the company. These defenses were based upon facts existing independent of the matter

contained in the application. The failure to comply with the statute in pleading the application, denied the company the right to resist the payment of the policies upon defenses arising out of the application. It did not prevent it from showing that in matters outside of the application the policies had been avoided. If a person other than the insured made the application and was examined, there was, of course, no contract between the company and the insured. And so, if the insurance was obtained as a part of a conspiracy entered into by persons having no insurable interest in the life of the insured, the contract was illegal, against public policy and non-enforceable. These two defenses the company made, and the lower court properly permitted wide latitude in the examination of witnesses whose evidence tended to support them."

This case is apposite here because the rule announced therein, expressed in general terms, is exceedingly elementary and applicable alike to all obligations. It is that a contract conceived in fraud has no legal existence and that this fact may be shown to defeat an action brought thereon (*Pac. Mut. Life Ins. Co. v. Glaser*, 245 Mo. l. c. 390). Thus, it appears, aside from the inapplicability of Section 6937, *supra*, that the defense sought to be made by the defendant in its special answer and cross-bill, that no contract had ever been made between it and the insured, should have been permitted. The trial court therefore erred in sustaining the plaintiff's demurrer.

II. The defense was based upon the theory that the contract was illegal in that no real agreement had ever been entered into by the parties. If this fact be established, then the contention of the defendant may be sustained upon a broader principle than the determination of its rights, viz., that of public policy. But is this defense available under a general denial? Under our system of pleading a general denial raises an issue as to each of the material allegations of the petition. [*Sells v. Railroad*, 266 Mo.

General
Denial.

l. c. 177; Kelerher v. Henderson, 203 Mo. l. c. 511.] In a certain class of cases, usually involving the right to the possession of property, and which do not distinguish between a general denial and the general issue, it is held that the defendant may prove any fact which goes to show that the plaintiff never had any cause of action. A compilation of this class of cases is to be found in Patton v. Fox, 169 Mo. l. c. 106.

It was held in Sprague v. Rooney, 104 Mo. l. c. 360, that the effect of a general denial is to deny the legality of a contract sought to be enforced, and to authorize the admission of evidence to show that the same, although on its face valid, was intended to accomplish an illegal object. This case was expressly overruled in McDermott v. Sedgwick, 140 Mo. l. c. 182, in which the following ruling was announced: Where there is nothing on the face of the petition to indicate other than a valid contract, if it is to be invalidated by some extrinsic matter, such matter must be pleaded. This ruling is in harmony with the current of authority, not only in the earlier, but the later cases as well. [School Dist. v. Sheidley, 138 Mo. l. c. 690; Bell v. Warehouse Co., 205 Mo. l. c. 493; Shohoney v. Railroad, 231 Mo. l. c. 147.]

Nothing appearing on the face of the petition to disclose the fraud on which the contract was founded, and the same being susceptible of formal proof without a showing as to its legality, the defense of its legal non-existence was not available under a general denial.

III. The joinder of the general denial, separately stated, with that of the special answer and cross-bill is expressly authorized by statute [Sec. 1807, R. S. 1909; State ex rel. v. Rogers, 79 Mo. 283; Cohn v. Lehman, 93 Mo. 574.]

The special answer and cross-bill alleged with sufficient certainty the grounds of the defense and the reasons for the affirmative relief prayed for. The latter consisted in a prayer for a decree canceling the

Special
Defenses.

State ex rel. v. Clark.

policy. This changed the action at law into one in equity and the case should have been heard by the court and not by a jury. [Myers v. Schuchmann, 182 Mo. 159; Wendover v. Baker, 121 Mo. 273.]

For the reasons stated, this case should be reversed and remanded, to be proceeded with as herein indicated.

It is so ordered. All concur, except *Blair J.*, not sitting.

THE STATE ex rel. JAMES WATERWORTH et al.
v. CLAUDE L. CLARK, Acting Superintendent of
Insurance.

In Banc, June 28, 1918.

1. **STATUTE: Unconstitutional Amendment: Prior Statute Restored.** If an existing statute be amended and reenacted, and be by the amendment rendered unconstitutional, the original statute, upon judicial declaration of invalidity of the amended statute, automatically comes into force again.
2. **INSURANCE: Rating Act: Unconstitutional Amendment of 1903: Restoration of Prior Statute.** The statute of 1898 declared that no fire insurance policy should contain a clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" or "making provision for a reduction of the loss or damage by reason of a failure to take out or maintain other insurance." In 1903 the statute was amended by adding a proviso that the inhibition "shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand or more inhabitants." *Held*, that, if the amendment had the effect to make the general inhibition a local or special law and for that or any other reason rendered the amended statute unconstitutional, the original act automatically came into force again, and if it was a valid enactment the general inhibition thereafter obtained.
3. **———: ———: Repeal by Implication of Existing Statute: Inconsistency.** There is no inconsistency between the Insurance Rating Act of 1915 and Section 7023, Revised Statutes 1909, and consequently Section 7023 was not repealed by implication by said act. Section 7 of said act does say that a fire insurance company shall

not "fix and charge any rate for fire insurance upon property in this State which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire," and Section 7023 declares that no insurance policy shall contain any clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" except in cities having one hundred thousand inhabitants or more; but there is a difference in the hazards and the amount of protection in such cities and in other parts of the State, and said Section 7, when the words "charges and credits" are read in the light of the next clause, means that it is only when the hazards and the protection against fire are the same that discrimination in rates is forbidden.

4. ———: ———: **Class Legislation.** Other things being equal classification in legislation on the basis of population is not unconstitutional.
5. ———: ———: **Filing of Rate With Superintendent: Mandamus.** The court refuses to compel, by its writ of mandamus, the Superintendent of Insurance to file, approve and permit the use on all standard policies of fire insurance of what is called the "Reduced Rate Contribution Clause" presented by petitioners, because the statutes do not authorize the same reduction in rates throughout the State.

Mandamus.

WRIT DENIED.

Thomas Bates, Seymour Edgerton and Chas. G. Revelle for relators.

(1) Sec. 7023, R. S. 1909, is in direct conflict with and was repealed by the "Rating Act." Laws 1915, pp. 313-320; State ex rel. v. Public Service Commission, 259 Mo. 704; State ex rel. v. Public Service Commission, 270 Mo. 547; Fidelity Trust Company v. Revelle, 181 S. W. 53. (2) Particularly was that part of said section repealed which prohibits the use of the "Reduced Rate Contribution" or "Coinsurance" clause in cities and towns having a population of less than one hundred thousand inhabitants. Sec. 7, Laws 1915, p. 316; Sec. 9, Laws 1915, p. 316; Sec. 10, Laws 1915, p. 317; Sec. 17a, Laws 1915, p. 319; Sec. 17, Laws

State ex rel. v. Clark.

1915, p. 319; State ex rel. v. Geiger, 65 Mo. 306; State ex rel. v. Draper, 47 Mo. 29; Railway Company v. Gas Company, 53 Mo. 17; State ex rel. v. Shields, 230 Mo. 91. (3) Whenever it is necessary in order to give full effect to subsequent laws or to make them conform to the legislative intent, or to make them harmonize with the provisions of the Constitution, words will be modified, changed, and even stricken from a law. State ex rel. Harvey v. Sheehan, 190 S. W. 864; State v. Moody, 202 Mo. 120; Perry v. Strawbridge, 209 Mo. 64; State ex rel. v. Geiger, 65 Mo. 306. (4) That part of Section 7023 which prohibits the use of the "Reduced Rate Contribution Clause" in cities and towns of less than one hundred thousand inhabitants violates Subdivision 32 of Section 53, Article 4, Constitution, in that it is special and local and relates to a subject on which a general law could have been made applicable. State v. Granneman, 132 Mo. 331; State v. Gritzner, 134 Mo. 529; Henderson v. Koenig, 168 Mo. 372. (5) That part of said section which denies to citizens of cities and towns having a population of less than one hundred thousand inhabitants the right to contract for a reduced rate and obtain the advantages of the co-insurance clause also violates Section 1 of Article XIV of the Constitution of the United States in that it denies to persons within the State's jurisdiction the equal protection of the law and deprives persons of property rights without due process of law. The attempted classification is arbitrary and unwarranted. State v. Loomis, 115 Mo. 307; State ex rel. v. Kimmel, 256 Mo. 637; State ex rel. v. Railroad, 246 Mo. 514.

Frank W. McAllister, Attorney-General, *Thomas J. Cole*, and *John T. Gose*, Assistant Attorneys-General, for respondent.

(1) Relator's "Reduced Rate Contribution Clause" is in effect a provision for co-insurance and is condemned by Sec. 7023, R. S. 1909. Alsop Process Co. v. Continental Ins. Co., 175 Mo. App. 317; Attorney-

General ex rel. v. Michigan Lubricator Co., 148 Mich. 566; Dahms & Sons Co. v. Ins. Co., 153 Iowa, 168; Farmers Feed Co. v. Ins. Co., 173 N. Y. 247; Richard's Insurance Law (3 Ed.), Sec. 242. (2) Section 7023, Revised Statutes 1909, was not repealed by the Rating Act of 1915. (a) It is not contended that said Section 7023 was directly repealed; (b) And Section 7023 was not repealed by implication. State ex rel. v. Slover, 134 Mo. 19; State v. Moulton, 262 Mo. 139; State ex rel. v. Wells, 210 Mo. 620; State ex rel. v. Stratton, 136 Mo. 429; Evans v. McFarland, 186 Mo. 723; State ex rel. v. Wilder, 197 Mo. 35; Manker v. Faulhaber, 94 Mo. l. c. 439; Lewis's Sutherland on Statutory Construction, p. 461 et seq. (3) The entire proviso attached to Sec. 7023, R. S. 1909, is unconstitutional, because it is in effect special and local legislation arising by the partial repeal of a general law. Mo. Constitution, Art. 4, sec. 53, par. 33; Sec. 7023, R. S. 1909; Henderson v. Koenig, 168 Mo. 370; State v. Anslinger, 171 Mo. 612; Anderson v. City of Trenton, 42 N. J. L. 486; Plummer v. Borsheim, 8 N. D. 565; In re Connolly, 17 N. D. 550. (4) The proviso being unconstitutional, Section 7023 will remain in force as it was prior to the unconstitutional amendment. State ex rel. v. Mills, 231 Mo. 498; Eberle v. Michigan, 232 U. S. 700; Lexington v. Lafayette County Bank, 145 Mo. 681; State v. Rich (Maryland), 36 L. R. A. (N. S.) 344; 36 Cyc. 1056. (5) This court should not strike from the proviso the words "in cities which now contain or which may hereafter contain one hundred thousand inhabitants or more." To do so would be to exercise the legislative function and make the proviso apply to the entire State, which clearly was not the intention of the legislature. State ex rel. v. Ry. Co., 195 Mo. 250; State ex rel. v. Railroad, 246 Mo. 517; Edmunds v. Herbrandson, 14 L. R. A. 730. (6) Courts will construe a statute as written, without regard to the results of the construction, or the wisdom of the law as thus construed. State ex rel. v. Wilder, 206 Mo. 549; Belfast

State ex rel. v. Clark.

Ins. Co. v. Curry, 175 S. W. 205; McCrary v. United States, 195 U. S. 27.

FARIS, J.—This is an original proceeding by mandamus whereby it is sought to compel respondent, as the Acting Superintendent of Insurance, to file, approve and permit the use on all standard policies of insurance of what is called the "Reduced Rate Contribution Clause."

The petitioners are the managers of what they denominate the "Missouri Inspection Bureau," an unincorporated entity, established and maintained under the provisions, it is alleged, of an act entitled "An Act to regulate insurance against loss or damage by fire, lightning, hail, windstorm and sprinkler leakage, and the rates of premium thereon, and to provide for the making and maintenance of public records in relation thereto, with an emergency clause," approved March 20, 1915. [Laws 1915, p. 313.]. This act is called in the briefs the "Rating Act," and we shall for convenience hereinafter refer to it by that name.

The Reduced Rate Contribution Clause, which petitioners by this proceeding seek to compel the Superintendent of Insurance to file and approve for use upon all standard policies, which policies he is required by another statute to approve, reads thus:

"Uniform Standard Missouri

"REDUCED RATE COSTRIBUTION CLAUSE WITH APPLICATION.

..... hereby request that there be attached to
Policy Number of the (name of company).....
....., the following Reduced Rate Contribution Clause,
to wit:

"In consideration of the rate at and or form under which this policy is written, it is expressly stipulated and made a condition of this contract, that this company shall be held liable for no greater proportion of any loss than the amount hereby insured bears to% of the actual cash value of the property described herein at the time when such loss shall happen; but if the total insurance upon such property exceeds% at the time of such loss, then this company shall only be liable for the proportion which the sum hereby insured bears to such total insurance.

State ex rel. v. Clark.

"If this policy be divided into two or more items the foregoing condition shall apply to each item separately.

"It is understood by the undersigned that the effect of the above-mentioned Reduced Rate Contribution Clause, when attached, will be to reduce the liability of the insurance, unless the property described in the policy covered by said insurance is insured for% of its actual cash value, except where the loss exceeds the amount of insurance required under this clause.

".....Assured.

"In compliance with the above application signed by the assured under this policy, made to and on file with this company, the above Reduced Rate Contribution Clause is made a part of this policy.

"Attached to and forming part of Policy No. of the (name of insurance company) issued at itsAgency.

"Dated, 19....

".....Agent.

"This application and clause must be signed by both assured and agent in duplicate and attached to both policy and daily report."

The issuance of an alternative writ has been waived, and it has been agreed that the petition filed herein should be regarded for all purposes as the alternative writ. To this petition, respondent has interposed a general demurrer, so that the case is before us upon an issue of law.

I. The respective contentions of law arising upon the demurrer, are these: Petitioners concede the application of a statute which was passed in 1893 (Laws 1893, p. 186,), and which was amended in 1903, by appending thereto a proviso in substance to the effect that the prohibition of the section should not be applicable to cities containing 100,000 inhabitants, or more (Laws 1903, p. 209), and which now appears as Section 7023, Revised Statutes 1909, and reads thus:

"No fire insurance policy which may be issued after this section takes effect shall contain any clause or provision requiring the assured to take out or maintain a larger amount of insurance than that covered by such

policy, nor in any way providing that the assured shall be liable as coinsurer with the company issuing the policy for any part of the loss or damage which may be occasioned by fire or lighting to the property covered by such policy, nor making provisions for a reduction of such loss or damage, or any part thereof, by reason of the failure of the assured to take out and maintain other insurance upon said property. And all clauses and provisions in fire policies, issued after the taking effect of this section, in contravention of the prohibitions in this section contained, shall be *ab initio* void and of no effect: *Provided*, that the provisions of this section shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand inhabitants or more whenever the insured sign an agreement endorsed across the face of said policy to be exempt from the provisions thereof."

But petitioners contend (a) that the Rating Act has by the clearest implication (aided by an express repealing section, affecting all inconsistent provisions) repealed Section 7023 *supra*, and (b) that whether repealed or unrepealed, Section 7023 is unconstitutional. The first point is not unduly *stressed in the petition*, and if it be made therein at all, it is made by the very vaguest implication. It is, however, most strenuously urged in the brief of the petitioners.

The contention of constitutional invalidity is bot-tomed upon the effect of the proviso, which was added, as stated above, by amendment in 1903. There is no attack made upon the section as it stood before the amendment, which amendment permits the attachment of the Reduced Rate Contribution Clause to a policy on the request of the assured, in all cities containing one hundred thousand inhabitants or more. It is on this point contended that the proviso had the effect to make the theretofore general inhibition against the Reduced Rate Contribution Clause a local and special law, and impaired the obligation of contracts, and that

as amended it denied to the inhabitants of the State, other than those residing in cities of one hundred thousand or more inhabitants, the equal protection of the law, and had the effect to take their property without due process of law.

The bare statement of the contention makes it apparent that even if the amendment in 1903 had the effect to render the act unconstitutional, the petitioners are in no wise aided by such invalidity. For it is fairly well-settled that if an existing statute be amended and re-enacted, and be by the amendment rendered unconstitutional, the original statute upon the judicial declaration of invalidity comes automatically into force again. [Lexington v. Lafayette County Bank, 165 Mo. 671; State ex rel. v. Mills, 231 Mo. 1. c. 498; State ex rel. v. Gantt, 274 Mo. 490; Eberle v. Michigan, 232 U. S. 700; State v. Rice, 80 Atl. 1026; 36 Cyc. 1056, and cases cited.] Since, therefore the original statute absolutely forbids and *makes void all reduced rate contribution clauses*, specifically, and because they were methods of co-insurance (Process Co. v. Continental Insurance Co., 175 Mo. App. 317) without regard to the residence of the assured, petitioners would be in no wise aided by the unconstitutionality of said section, in so far as such invalidity is bottomed upon the fact of amendment. We need not therefore take up space with this contention.

II. But it is said that the Rating Act of 1915 is patently inconsistent with the provisions of Section 7023, and that, therefore, the latter is repealed by Section 17 of the Rating Act, which expressly repealed all inconsistent acts or parts of acts. [Laws 1915, sec. 17, p. 319.]

The rule is well-settled that repeals by implication are not favored in law. [Gasconade County v. Gordon, 241 Mo. 569.] There is in the Rating Act an express repeal, however, of all acts and parts of acts which are inconsistent with the provisions of that act. [Sec. 17, p. 319, Laws 1915.] This leaves open for judi-

cial determination the question whether there is as between the provisions of the Rating Act and those of Section 7023, *supra*, any irreconcilable conflict and repugnancy. [Stricklen v. Combe Printing Co., 249 Mo. 614.] If there is, we must needs enforce the section which repeals all inconsistent provisions, and declare so much of Section 7023 as is in conflict with the provisions of the Rating Act to be no longer in force. Particularly it is contended that Sections 9 and 10 of the Rating Act are in conflict with the provisions of said Section 7023.

In brief, and substantially, Section 7023, *supra*, provides: (a) That no insurance company shall write any policy which requires the assured thereunder to carry a larger amount of insurance than that covered by such policy; (b) nor any policy requiring the assured to become in effect a co-insurer with the company issuing the policy for any part of the loss or damage which may accrue; (c) nor any policy providing for a reduction of the amount otherwise payable in case of loss, by reason of the failure of the assured to take out and maintain in force other and additional insurance upon the property. The proviso, mentioned above, removes this prohibition as to those persons residing in cities of one hundred thousand inhabitants or more, who may, upon their own written request, make insurance contracts of the forbidden sort.

Section 1 of the Rating Act requires each company engaged in taking risks of the sort named in the title of the act, to maintain a public rating record, from which the premium applicable to every risk in the State may be ascertained. This record is required to show basis rates, with all additions to such rates caused by exposures, or conditions, permits and standards, and the forms and endorsements on which each rate is predicated, as well as the change of rate made on account of the change of form and endorsements. These records are to be kept open to the public, in order that the proposed insurer may readily ascertain in advance the rate to be charged him, and the com-

ponents of charge and credit which go to make up that rate. [Sec. 1, p. 314, Laws 1915.] Upon the issuance of any policy the assured shall be furnished a schedule, or analysis, which shows the basis rate and the items of charge and credit which enter into and determine the whole rate charged. Section 7, of said Rating Act, forbids any company, or any rating bureau, from fixing any rate which discriminates unfairly between risks by reason of the application of like charges and credits, or which discriminates unfairly between risks which have substantially the same hazards and the same protection against fire. Section 9, forbids the giving of any rebate by which the discrimination forbidden in Section 7 of the act may be brought about by evasion or subterfuge. Its effect is in all respects similar to that of Section 7 *supra*. Section 10 provides details by which the forbidden discrimination set out in Section 7 may be prevented. These sections are the only ones pointed out to us by the petitioners where-in the alleged conflict is urged as existing.

A careful reading and analysis of the Rating Act in the light of these contentions shows that the whole gist and burden of petitioners' complaint rests upon the forbidden discrimination contained in Section 7. This section is short and fairly plain, and we quote it for convenience and information. In full it reads thus:

"No fire insurance company or other insurer, nor any rating bureau, shall fix and charge any rate for fire insurance upon property in this State which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire." [Sec. 7, p. 316, Laws 1915.]

If the *proviso* of said Section 7023, *supra*, which permits an assured residing in a city of one hundred thousand or more inhabitants to obtain a lower rate of insurance by reason of having attached to his policy the Reduced Rate Contribution Clause, discriminates unfairly between risks of essentially the same hazards,

and having substantially the same degree of protection against fire, as against an assured residing in the country, or in a city, town or village having less than one hundred thousand inhabitants, it is obvious that contradiction, contrariety and irreconcilableness inhere sufficient for a repeal of said Section 7023, by implication. If there is no difference in the hazards and the amount of protection against fire afforded to property situate in a city containing one hundred thousand inhabitants or more, as compared with that in a rural community, or in cities, towns and villages of the State containing less than one hundred thousand inhabitants, manifestly the point is well taken.

But is there not a difference, and is not that difference great enough to furnish a reason for the legislative distinction made? We think both of these questions must be affirmatively answered. For it will be seen that Section 7 does not prohibit all discrimination in rates; it only prohibits such discrimination in cases where the hazards are equal and the same degree of protection against fire is afforded. It is idle to say that the hazards of fire and the protection against the same are equal in St. Louis and Clinton, or in Kansas City and Cape Girardeau, or in St. Joseph and Cedar City. On first blush, the general provision in said Section 7 of the Rating Act, which forbids unfair discrimination "between risks in the application of like charges and credits," might seem to require the Reduced Rate Contribution Clause on every policy, if it is to be attached to any; because such a clause is either a charge or a credit (relators in effect say it is the latter) within the purview of Section 1 of the act, which requires all such charges and credits to be rated. But it is fairly clear that the words "charges and credits" simply mean, as the next subsequent clause makes plain, "hazards" of fire and "protection against fire." No other meaning is possible. Some of these charges are made upon the basis of nearness and nature of exposures, and some for defective construction, or construction below the standard fixed,

of the building insured, or the building containing the insured property. It is plain that these are "hazards," within the meaning of the last clause of the section. Likewise, the same is true of the "credits." These depend on the nearness and nature of the fire protection afforded, the distance and kind of exposures, and the nature of the construction above standard. So, all the charges and credits of this section depend wholly on the hazards and protection against fire. Indeed, this is the effect conceded by learned counsel in their exhaustive briefs, for they strenuously insist that it was the intent of the Rating Act to give to insurers throughout the State "regardless of where their property may be located, the same rate when the conditions and the risks are the same."

If these conditions and risks are the same, then the Legislature, having no right to differentiate as between such risks, whether they are in rural districts or in cities of one hundred thousand or more inhabitants, must have intended to repeal Section 7023 *supra*, when they passed Section 9 of the Rating Act. If there is a difference in the hazards and the fire protection respectively afforded, then it is manifest that there is no inconsistency or repugnancy in these provisions, and the Legislature did not intend to repeal Section 7023. [State v. Moulton, 262 Mo. 137; State ex rel. v. Wells, 210 Mo. 1. c. 620; State ex rel. v. Wilder, 197 Mo. 27; I Lewis's Sutherland on Stat. Con., sec. 256.] The rule upon both phases of this proposition is well stated in the excellent work of Mr. Lewis, thus:

"Affirmative statutes which contain no reference to existing statutes, either to amend or repeal them, import that the law-maker has no conscious purpose to affect them, unless by congruous addition. On the other hand, when there is inserted in a statute a provision declaring a repeal of all inconsistent acts and parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted

before. There is a repeal to the extent of any repugnancy in either case, but no farther. The insertion, therefore, of such a general repealing clause adds nothing to the repealing effect of the act."

Other things being equal we have long accorded to the Legislature the privilege of classification in legislation upon the basis of population. [State ex inf. v. Southern, 265 Mo. l. c. 286; State ex inf. v. Tobacco Co., 177 Mo. 1; State ex rel. v. County Court, 128 Mo. l. c. 442; State ex rel. v. Bell, 119 Mo. 70; State ex rel. v. Roach, 258 Mo. l. c. 561; State ex rel. v. Miller, 100 Mo. l. c. 447.]

Upon this consideration in the last analysis the whole case as presented turns. We are constrained to say that since the Legislature had the authority to make the population distinction which occurs and which justifies the classification, we cannot say that there exists any sufficient repugnancy and inconsistency, as to work a repeal of Section 7023, by that implication, arising from the express repeal of inconsistent acts and parts thereof.

Other questions raised by respondent, viz., (a) that the proviso appended to Section 7023 is itself unconstitutional, and (vaguely) (b) that since the exercise of the authority to approve a form of standard fire or lightning insurance contract is one which under the statute (Sec. 7030, R. S. 1909) rests in the sound discretion of the Superintendent of Insurance, that discretion, so far as it is bottomed on policy, cannot be interfered with by mandamus, not being necessary to a decision, have not been considered. Neither have we considered the effect upon relators' position of the holding in *Nalley v. Home Insurance Co.*, 250 Mo. 452, touching the constitutional validity of said Section 7030, Revised Statutes 1909. We have considered the case as it was presented to us.

It follows that the demurrer of respondent herein should be sustained, and the peremptory writ denied, and it is so ordered. All concur.

THE STATE ex rel. WATTS ENGINEERING COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION.

In Banc, June 28, 1918.

PUBLIC UTILITY: Reduction of Rates: Suspension During Appeal: Money Earned Belongs to Company. Where the Public Service Commission, in order to test the reasonableness of rates charged by a gas company, ordered it to reduce its rates to specified maximums for a period of three years, and retained jurisdiction in order that a proper final order might be made after the test was tried out, and on appeal by the company to the circuit court the order was affirmed, but the court, pending an appeal to the Supreme Court, suspended the order and impounded the excess in rates over those fixed by the Commission, and its judgment was affirmed by the Supreme Court, the gas company is entitled to the excess collected during the time the appeal was pending in the Supreme Court; for, the order having been suspended, the company was lawfully entitled to adhere to its former rates until the judgment of affirmance was rendered.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*, Judge.

REVERSED AND REMANDED (*with directions*).

J. L. Hornsby for appellant; *W. M. Fitch* of counsel.

(1) The entire sum of \$8481.28 and interest earned thereon was ordered impounded by the circuit court without authority of law, and the whole of said sum is due the appellant, and should be paid to it. (2) Even if the gas consumers who originally paid this fund to appellant had any interest in the fund, the fund should not be distributed until after the Public Service Commission has made a final order fixing reasonable rates to be charged by appellant.

Alex Z. Patterson, General Counsel, and *James D. Lindsay*, Assistant Counsel, for respondent, Public Service Commission.

(1) The right of having a *supersedeas* or suspension of the order is not a constitutional right, but is purely statutory, and extends no farther than the clear limits of statutes creating it. Sections 112 and 114, Public Service Act; *State Public Utilities Commission v. Chicago & W. T. Rd. Co.*, 275 Ill. 555, P. U. R. 1917B, l. c. 1059. (2) The statutes allowing a suspension make no distinction between an order declared to be in the nature of a "test" order, and one made without expressed conditions or reservations. Sections 112 and 114, Public Service Commission Act. (3) The difference between an order without reservation fixing rates and what is termed a "test" order, is not a difference in kind, but is a difference in degree of conclusiveness expressed, as to the permanence, and reasonable character of the rates fixed. Under the Public Service Act and in the inherent nature of the subject itself, all rate orders are more or less empirical. Sections 20 and 82, Public Service Commission Act. And this applies to all commissions and rate-making processes. (4) The attitude of courts in respect of tests in cases where the rates of the company have been lowered, is not that the company shall be permitted to charge the former rates, but that it must, unless the new rates appear to be confiscatory, submit to the new rates, with the right and opportunity, within a reasonable and proper time, to make application for a raise or readjustment of rates, or, if the suit be for injunctive relief, renew its application for an injunction. *Darnell v. Edwards*, 244 U. S. 564; *Wilcox v. Consolidated Gas Company*, 212 U. S. 1; *Knoxville v. Knoxville Water Company*, 212 U. S. 19; *Missouri v. C., B. & Q. Railroad*, 241 U. S. 533. (5) The appellant was entitled to, and was allowed a suspension of the order only until "the final decision of the case" (the case in court), and could not be more entitled to re-

ceive or retain the excess collected by it before such final decision, than after such final decision. Sections 112 and 114 and cases cited above. (6) The test or requirement made upon appellant by the Commission was a reasonable and valid one. State ex rel. Watts Eng. Co. v. Pub. Serv. Com., 269 Mo. 525. Being so, appellant was bound to undergo the test, and to comply with the requirement made, upon the terms of the requirement, and at the expense of appellant, and not at the cost of the consumers. All cases cited above.

BOND, C. J.—I. Upon complaint of the City of Columbia, the Public Service Commission made an order requiring the owner of the local gas works to make a lower schedule of prices for the sale of gas. in that city, specifying in the order the maximum rates that should thereafter be charged for three years from March 1, 1915. The Public Service Commission, for the purpose of future modifications, dependent upon the result of this test, retained full jurisdiction of the cause.

The grounds of the provisional order and the evidence upon which it was based are recited in the opinion of this court (269 Mo. 525) upon the appeal from the judgment of the circuit court of Cole County affirming the order of the Commission.

While the case was under review in the circuit court of Cole County an order was made by that court suspending the effectiveness of the provisional order of the Public Service Commission and impounding the excess of collections for rates of gas over the rates specified in the order of the Commission during the pendency of the review of such order in the lower court and during the pendency of an appeal to this court.

Upon the filing of the mandate and decisions in this court in the circuit court of Cole County, on March 10, 1917, the owner of the gas company, as relator, moved the circuit court to make an order directing the repayment to it of the excess collections,

amounting, on February 1, 1917, to the sum of \$8481.28, and which, under the orders of the circuit court, had been placed in the Central Missouri Trust Company of Jefferson City, Missouri.

The circuit court denied the application of the relator and rendered judgment for the distribution of the aforesaid sum. From that judgment the relator perfected an appeal to this court.

II. The statute (Public Service Commission Law, sec. 112) provides that "in case the order or decision of the Commission is stayed or suspended" such stay or suspension "shall not become effective" until the giving of a statutory bond.

Suspension
Order: Right
to Money Earned.

The statute further provides that upon an appeal from a judgment of the circuit court rendered in a proceeding to review the order of the Commission, "the circuit court may, in its discretion, suspend its judgment pending the hearing in the Supreme Court on appeal, upon the filing of a bond," etc. [Pub. Serv. Law, sec. 114.]

In the instant case the suspension orders contemplated by these sections of the statute were duly made in the trial court. The question, therefore, is to whom does the money collected in the interim of the final decision of this court, affirming the right of the Commission to make a test order, belong? In determining this it is well to note the exact points ruled on the former appeal in this case. In stating the question then presented, this court said:

"If the order made in this case had been one permanent in character the question presented would be entirely different. But such is not the nature of the order made by the Public Service Commission. Our function is to determine the reasonableness of the order as we find it. The present order is one made for the purpose of making a test, to the end that the

real question of a reasonable rate may be ultimately determined." [State ex rel. v. Public Service Com., 269 Mo. l. c. 535.]

In the further discussion of the question of the reasonableness of an order of the peculiar nature of the one then under review, the opinion *supra* grounded its conclusion of the reasonableness of the test order upon the observation that the evidence tended to show "that a reduction in rates would increase the sales or consumption," adding, "this can only be determined by actual test. Such was the course pursued by the Public Service Commission," by the order made in this case and it is this "test order" that was then held in judgment. [269 Mo. l. c. 535.]

This court thereupon proceeded to affirm the judgment of the circuit court sustaining the order of the Commission and closed its opinion with these words: "If after the test, the rate is found to be too low, the matter can be corrected by the Public Service Commission." [L. c. 539.]

The above adjudication of the nature and purposes of the order of the Commission became the subsequent law of this case.

We, therefore, assume (as is stated in appellant's brief) that it at once obeyed the order of the Commission and lowered its rates in conformity, and that it has thereafter charged only, for the supply and service of gas, the rates tentatively fixed by the Commission, and that the permanency of such rates is a question for the determination of the Commission on facts which shall be developed by the application of the trial rates fixed in its experimental order. It is evident, however, that until the time of putting the trial rates into operation, there was and could have been no test or trial at all, for until they became effective all consumers paid the old rates in vogue before the order of the Commission. It is equally obvious that until the application of the test rates, none of the results contemplated by that experiment could become

State ex rel. v. Reynolds.

known to the Commission, which had reserved jurisdiction for the very purpose of ascertaining (through the results of a test) whether the lowering of the prices would so increase the consumption and profits as to provide the sum or percentage of earnings which the Commission held the utility was entitled to earn.

It is an obvious corollary that the difference between the former rates and those specified in the test order (being the amount which has been impounded during the litigation) cannot belong to any other person than the owner of the utility, who was lawfully entitled to adhere to its former rates, under the suspension orders of the circuit court, until the final judgment of this court directing it to put into effect the trial test prescribed by the Commission. The circuit court, therefore, erred in directing this amount to be distributed to any other person than the owner of the gas plant.

The judgment of the circuit court of Cole County is reversed and the cause remanded with directions to ascertain what portion of the amount of the collections was received pending the finality of the judgment of this court on the former appeal, and to order so much thereof to be paid over to the appellant. It is so ordered. All concur.

THE STATE ex rel. G. A. WURDEMAN, Judge of Circuit Court, and SHERMAN E. SMALLEY et al., v. GEORGE F. REYNOLDS et al., Judges of St. Louis Court of Appeals, and STERNS TIRE & TUBE COMPANY et al.

In Banc, June 28, 1918.

1. **JURISDICTION: Courts of Appeals: In Original Proceedings.** Where relief is sought other than in the recovery of a monetary judgment, the value of the right involved, estimated in money, constitutes
275 Mo.—8

the measure of jurisdiction of the appellate court to hear and determine an original writ. Jurisdiction of a court of appeals in prohibition and other original proceedings should be brought as nearly as possible into harmony with its appellate jurisdiction. A court of appeals is not authorized to issue such writs, or to exercise superintending control over inferior courts, in cases in which the Supreme Court has jurisdiction by appeal or writ of error.

2. ———: ———: ———: **Suit Against Corporation for Accounting, Etc.** Suit was brought by two stockholders, the par value of whose stock was \$8300, against the directors of a corporation, whose tangible property was \$25,000, charging deceit, fraud and waste in its management, and praying for an accounting and the appointment of a receiver. *Held*, that the Court of Appeals had no jurisdiction of a writ of prohibition to prevent the circuit judge from hearing and determining the bill in equity.
3. **FOREIGN CORPORATION: Supervision by Domestic Courts.** A court of equity, by statute and independently of the statute, has power to exercise a supervisory control over a foreign corporation, whose chief office, principal place of business and tangible property are in this State and whose directors and other officers reside here, and at the request of its stockholders, showing fraud, deceit and waste by its managers and directors, to entertain a bill asking for an accounting and the appointment of a receiver. [Distinguishing *State ex rel. Life Ins. Co. v. Denton*, 229 Mo. 187, and *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78.]
4. **INJUNCTION: Prior Notice.** The giving of notice of an application for temporary injunctive relief and the appointment of a receiver for a corporation is not a necessary precedent condition in all cases. Where the need is crying notice is not a prerequisite.
5. **PLEADING: Accounting.** Pleadings for an accounting are liberally construed, and where the allegations substantially state a case a demurrer to the petition should be overruled. The bill must be interpreted by employing in its aid all reasonable inferences from the facts stated and all implications and intendments its terms will afford, in support of any relief competent for the court to grant.
6. ———: ———: **Profit on Company Stock.** An allegation in the petition of stockholders against the president and directors of a corporation that the president bought 300 shares of its stock from a stockholder at \$40 a share for the use of the company and sold it at \$60 per share, at a profit of \$2000 to himself, states a specific and sufficient ground for an accounting.
7. ———: ———: **False Entry on Books.** A charge by a stockholder in his petition that the president and directors purchased certain articles for the corporation at \$17,000 and then caused entries to

State ex rel. v. Reynolds.

be made on the books showing an expenditure of \$22,000 on that account, will authorize an accounting.

8. ———: **Removal of President of Corporation.** A bill by a stockholder which seeks to have the president of the corporation removed on the ground that he draws an exorbitant salary, stating facts which tend to show that his salary is exorbitant, is not demurrable.

Prohibition.

WRIT GRANTED.

Albert D. Nortoni and A. E. L. Gardner for relators.

(1) It is manifest on the face of the petition, that the amount in dispute exceeds the sum of \$7500, and therefore such suit is within the supervisory control and appellate jurisdiction of the Supreme Court. The St. Louis Court of Appeals therefore was and is without jurisdiction to issue or entertain its prohibition against the circuit court in which the suit was then pending. State ex rel. Union Electric Light & Power Co. v. Reynolds, 256 Mo. 710; State ex rel. Sale v. Nortoni, 201 Mo. 1; State ex rel. Blakemore v. Rombauer, 101 Mo. 499; State ex rel. Rogers v. Rombauer, 105 Mo. 103. (2) It is the settled law, that upon the state of the record in the court of first instance depends the question as to whether the Court of Appeals or the Supreme Court has jurisdiction. State ex rel. Union Electric Light & Power Co. v. Reynolds, 256 Mo. 710; Bates v. Werries et al., 196 S. W. 1124; Bowles v. Troll, 262 Mo. 377. This is the rule deduced and announced by the St. Louis Court of Appeals in Gartside v. Gartside, 42 Mo. App. 513, 113 Mo. 348; Evens-Howard Fire Brick Company v. St. Louis Smelting Co., 48 Mo. App. 634; Evens-Howard Fire Brick Company v. St. Louis Smelting Co., 48 Mo. App. 636. (3) The par value of the stock owned by plaintiffs, under the averments of the petition, fix the amount in dispute at \$8300, at any rate and in any view of the case. Robinson v. West Virginia Loan Co., 90 Fed. 770. In a suit by stockholders, for the appointment of

a receiver of a corporation, the amount in dispute may also be ascertained by reference to the value of the corporate assets, for the receiver takes title to such assets and property when such is the decree. *Towl v. American Building Loan & Inv. Co.*, 60 Fed. 131; *Thompson v. Greeley*, 107 Mo. 577; *High on Receivers* (4 Ed.), Secs. 121 and 121a. (4) Irreparable loss and damage means that injury or loss cannot be compensated—that is, of course, a total loss. 23 Cyc. 356. (5) “The plaintiff may have under the prayer for general relief any relief he shows himself entitled to and which is also consistent with the petition.” *Mun- enks v. Bunch*, 90 Mo. 500; *Newham v. Kenton*, 79 Mo. 382; *McGlothlin v. Hemery*, 44 Mo. 350. The courts are liberal in their construction of pleadings for an accounting and the bill or complaint will be upheld when the allegations substantially make out a case.” 1 Ency. Plead. & Prac. 97. “The pleading should be construed in its plain and ordinary meaning, according to the object of the bill, and such an interpretation given it as fairly appears to have been intended by its author.” *Stilwell v. Hamm*, 97 Mo. 579; *Hickory Co. v. Fugte*, 143 Mo. 71; *Davis v. Jacksonville Line*, 126 Mo. 78. Such, too, is the sense of the statute. Sec. 1831, R. S. 1909. (6) The directors and officers of a corporation occupy a fiduciary relation toward the shareholders and are treated in equity as trustees for them. 10 Cyc. 887; *Chouteau v. Allen*, 70 Mo. 290; *Keokuk Packet Co. v. Davidson*, 95 Mo. 467. Therefore, such directors and officers are not permitted to deal at once for the corporation and themselves and will be required to account, if they do so. 10 Cyc. 789; *Keokuk Packet Co. v. Davidson*, 95 Mo. 467. Such directors and officers are not permitted to secure to themselves an advantage not common to all shareholders, nor make a secret profit, and, if they do, they are required to account to the corporation and its shareholders. 10 Cyc. 791-792; *Keokuk Packet Co. v. Davidson*, 95 Mo. 467.

Morton Jourdon, Geo. C. Mackay and W. G. Carpenter for respondents.

(1) The Court of Appeals has jurisdiction because the case, as presented by the petition in the trial court, in no manner discloses facts which show that the "amount in dispute" exceeds its statutory jurisdiction of \$7500. *R. S. 1909, sec. 3937; Bates v. Werries, 196 S. W. 1124; Bowles v. Troll, 262 Mo. 377.* (2) The allegations in the petition urged as the basis for an accounting give no data sufficient to show that the "amount in dispute" exceeds the jurisdiction of the Court of Appeals. *Albers v. Moffett, 262 Mo. 645; Kocurek v. Matychowiak, 185 S. W. 740.* (3) There is nothing in the record which discloses any legal basis for showing that the monetary value of the injunction or other equitable relief sought in the petition exceeds the jurisdiction of the Court of Appeals. *Gast Bank Note Co. v. Fennimore Assn., 147 Mo. 557.* (4) "It is always a suspicious circumstance where a single stockholder, among a large number of a corporation, rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so, where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim *de minimis non curat lex* very properly applicable" *SAWYER, J., in Dan Meyer v. Coleman, 11 Fed. 97). Benedict v. Western Union, 9 Abb. New Cases, 214; Albers v. Exchange, 45 Mo. App. 206.*

WALKER, J.—This is a proceeding in prohibition against the judges of the St. Louis Court of Appeals, the Sterns Tire & Tube Company, William L. Burgess, Otto L. Menzing, Adam M. Joerder and Arthur E. Koerner.

A bill in equity had been filed in the circuit court of St. Louis County by Sherman E. Smalley and Ephrim S. Garrett, relators herein, against the corporation

and the individuals who are respondents here. These respondents sued out a writ of prohibition in the St. Louis Court of Appeals to prevent the hearing and determination of the said bill in equity. After the issuance of the preliminary writ of prohibition by the Court of Appeals, the action at bar was instituted to prevent further interference by the Court of Appeals with the suit in equity, on the ground of a lack of jurisdiction. The respondents' answer was in the nature of a demurrer. Upon these pleadings, after argument, the case was submitted.

The bill in equity is set out at length in the petition for prohibition filed herein. The material allegations of same having been admitted by respondents' demurrer, constitute the facts for the determination of relators' right to a permanent writ. Such allegations therefore, as are necessary to an understanding of the case, and are determinative of the Court of Appeals' jurisdiction, will be embodied in the statement of facts.

Hon. Gustavus A. Wurdeman is one of the judges of the circuit court of St. Louis County. The bill in equity was filed in his division of that court. When the writ of prohibition was sued out in the Court of Appeals he was named therein as one of the respondents. Hence, his appearance as one of the relators in the case at bar. The relators, other than Judge Wurdeman, are Sherman E. Smalley and Ephrim S. Garrett. Their interest in the proceeding is as stockholders in the Sterns Tire & Tube Company, the corporation respondent. Smalley owns 28 shares of the capital stock of same, and Garrett 55 shares. Each of these shares has a par value of \$100, or a total value of \$8300. It was to protect their respective interests as stockholders of said corporation that the suit in equity was instituted.

Of the respondents, Burgess is the president of the said corporation; Menzing is its vice-president and sales manager; and these two, with Joerder and Koerner, are the sole directors.

The corporation was organized in the State of Delaware, with a capital stock of one million dollars, divided into ten thousand shares of the par value of \$100 each. Soon after its organization, it was authorized to do business in Missouri. It maintains its chief office or place of business in St. Louis County, where it owns and occupies in the transaction of its business about four and one-half acres of land, with buildings thereon, and machinery, goods, wares, merchandise, books and papers, of the value of \$25,000.

The petition or bill in equity charges at great length and with much particularity, that Burgess, the president, who is paid, as such, a salary of \$10,000 per year, directs and dominates the other directors and thereby has the complete control of the business and affairs of the corporation; that the management of same by said Burgess and the other directors is characterized by deceit, fraud and waste, in disregard of the best interests of the corporation, and to the damage and irreparable loss of all its stockholders, except its directors; that for a number of years the statements made by these directors of the business affairs of the corporation show that it is being conducted at a great loss during each month and year covered by the term specified, up to the date of the filing of said bill, and that it has no income except that arising from the sale of its stock. This is followed by the usual formal allegations of a lack of other adequate remedy, the necessity for the protection of all of the stockholders, of the appointment of a receiver, an accounting, and for such other and further orders, etc., as may be necessary within the authority of the court.

As is evident from the character of the pleading of respondents, the issuance of the writ herein, except incidentally, is not questioned on account of the technical insufficiency of the petition or bill. It is contended, in effect, that what it does show, rather than what it does not, constitutes grounds ample for the refusal of the writ.

The returns of the respective respondents, stated briefly according to their tenor, will most aptly illustrate their attitude. The judges of the St. Louis Court of Appeals raise a question of law solely in that they insist that said court is rightfully possessed of jurisdiction to issue its writ against the circuit court of St. Louis County, and that the presiding judge of the Court of Appeals was acting within the jurisdiction of said court when he issued the preliminary writ of prohibition, and that such court has full and complete authority to hear and determine the same.

The other respondents, Sterns Tire & Tube Company, William L. Burgess, its president, Otto L. Menzing, Adam M. Joerder and Arthur E. Koerner, all of whom are directors thereof, for their return, demur to the petition and writ of relators in that they say: first, that the matters and things therein stated are not sufficient in law or equity to entitle relators to the relief asked for in said petition or to authorize the issuance of the writ of prohibition by the Supreme Court; second, that the record in the prohibition proceeding in the St. Louis Court of Appeals, which relators here assail, does not disclose such facts as to bring the said proceeding within the jurisdiction of the Supreme Court, but that such record on its face discloses that said cause is within the jurisdiction of the St. Louis Court of Appeals; third, that there is nothing before this court from or by which it is made to appear that the money value or "the amount in dispute" exceeds the statutory jurisdiction of the Court of Appeals; fourth, that, in the petition or bill in equity, filed in the circuit court of St. Louis County, which is the basis of this action, the plaintiffs therein pray that the said court require (1) defendants Burgess, Menzing, Joerder and Koerner to account to the defendant corporation for all moneys made by means of secret profits, as therein mentioned, for the benefit of the corporation and all of its stockholders; (2) that said Burgess, Menzing, Joerder, and Koerner be removed as officers and as directors

of the corporation and restrained from further conducting or interfering with its affairs, and (3) that a receiver be appointed for such corporation. That said petition, or bill, presents no data for estimating the amount which might be derived, if any, if it were adjudged that an accounting on the part of the defendant directors be had, and there is no legal basis for estimating the value of any of the relief sought by plaintiffs in their petition. Respondents, therefore, pray the preliminary writ of prohibition be discharged.

I. As to jurisdiction. The object here is not to obtain a money judgment. If so, the question as to the court entitled to cognizance in the determination of this case would be of easy solution, the terms of the Constitution being so plain and pertinent relative thereto, that the employment of other words in defining its meaning would be rendered unnecessary. While the Constitution confers power upon the Courts of Appeals, as well as the Supreme Court (Secs. 3 & 12, Art. 6.), to issue and determine original remedial writs, the line of demarcation between the jurisdictions of these respective courts in this regard is not defined. The general language employed in the Constitution has, therefore, rendered judicial interpretation necessary that the cognizance of these tribunals in cases of the character here under review may be rendered as nearly in harmony with the court's appellate jurisdiction as the difference in the cases may admit. The result of this interpretation, as attested by numerous cases, is that where relief is sought other than in the recovery of a money judgment, the value of the right necessarily involved, estimated in money, will constitute the measure of jurisdiction. [Bates v. Werries, 196 S. W. 1. c. 1126; Bowles v. Troll, 262 Mo. 1. c. 382; State ex rel. E. L. & P. Co. v. Reynolds, 256 Mo. 1. c. 718.]

Ruled otherwise, we would have presented the incongruous spectacle of the Courts of Appeals' appellate jurisdiction being limited to \$7500, and having

no limit in applications for original writs. This was not intended by the framers of the Constitution; but, that these tribunals in the exercise of their respective jurisdictions, should be governed by the same standard in one class of cases as in others.

Here the value of the right of relators, necessarily involved, is that of \$8300. The actual value of the tangible property, real and personal, of the corporation, admitted by respondents (*State ex rel. v. Reynolds, supra*), is \$25,000. Leaving out of consideration the value of the capital stock other than that belonging to the relators, the definitely stated value of the right involved is far in excess of the jurisdiction of the Court of Appeals. The conclusion is therefore authorized, in harmony with the reasoning in the cases cited, and as definitely declared in *State ex rel. Sale v. Nortoni et al.*, 201 Mo. 1, that "the Court of Appeals has no jurisdiction by original writ of prohibition to prohibit a circuit court from proceeding in a case where the appeal from a judgment in such case is to the Supreme Court."

The result of this ruling, expressed in general terms, is, that while the Constitution gives courts of appeals co-equal authority with the Supreme Court in the issuance of original writs and in the superintending control over inferior courts, it does not mean that the courts of appeals shall issue such writs, or have such superintending control, in cases in which the Supreme Court would have jurisdiction by appeal or writ of error.

II. The absence of jurisdiction of the Court of Appeals having been shown, there remain only subordinate questions for determination. It is rather timorously urged by respondents that the bill in equity upon which this controversy is based, while lacking definiteness of averment, is not sufficiently comprehensive to authorize the trial court in granting the relief sought. We do not agree with this conclusion. While we have not set out the bill

Sufficient
Petition.

in haec verba in the statement of facts, we have carefully examined the same in the light of apposite precedents, and while it abounds in words, and, as a consequence, is unusually lengthy, it contains all of the necessary allegations to entitle the plaintiffs, upon adequate proof, to the relief prayed for. In view of this conclusion, a review in detail of the respondents' objections in this regard, would be profitless and serve only to unduly lengthen this opinion.

III. It is urged that a foreign corporation doing business in this State is immune from the supervising control of a court of equity. There is no merit in this contention. This corporation not only has its chief office and principal place of business in this State as well as all of its tangible property, but its directors and other officers reside here. Other than its creation in a foreign State, its attributes, functions and activities are the same as those of a domestic corporation. Under this state of facts, the contention is attenuated that it should not be subjected to the supervision of our courts in the same manner as are domestic corporations.

The relief sought by relators as plaintiffs below, as applied to a domestic corporation, is well within the purview of a court of equity. A cogent reason exists for the denial of such relief when asked in the supervision of a foreign corporation where the facts are such that the decree, if rendered, is impossible of enforcement. This condition existed in the case of *State ex rel. Life Ins. Co. v. Denton*, 229 Mo. 187. In that case, this court prohibited the circuit court from inquiring into the business of a foreign insurance corporation for the purpose of correcting certain alleged mismanagement. The bill, so far as its formal sufficiency in equity and the right of plaintiffs to relief, under an effective state of facts, was not questioned; but it appearing that except for the transitory transaction of business here, the corporation was not only created in a foreign jurisdiction, but had its

locus standi, officers, office, and assets there, it was held that a decree rendered in favor of the plaintiff would be futile; that while the arm of a court of equity will reach anywhere within our borders, it will not reach beyond, and hence the proceeding should be prohibited. The bill in that case asked for a discovery and an accounting, and VALLIANT, J., in his usual perspicuous style, in disposing of the question, said: "Such an accounting is not beyond the jurisdiction of a court of equity that may have full jurisdiction of the corporation, but is beyond the jurisdiction of a court of equity that has only the limited or qualified jurisdiction over a foreign insurance company that is given by our laws to our courts." [P. 196.] This doctrine is but a special application of the general maxim that a court of equity will not do a vain and foolish thing. It finds further judicial expression in the case of *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78, 149 S. W. 479, in which it is held, Woodson, J., speaking for the court, that "a court has no jurisdiction to order an accounting of a foreign corporation's business affairs and to determine therefrom in a suit against it by a member thereof, whether he has been and is being charged excessive rates on his insurance certificate issued by it, and thereupon render judgment for an excess collected, and enjoin any such collections."

So far as this declaration may appear from its terms to be general, it might be held to support the conclusion that a foreign insurance company could not be supervised by our courts in regard to the matters therein mentioned. The ruling, however, must be interpreted in the light of the facts upon which it is based. They are, that the corporation, as in *State ex rel. v. Denton*, *supra*, in addition to its creation elsewhere than in the State, had no other local existence than to transact business here. This ruling, therefore, may be said to be in complete harmony with that in the *Denton* case. The rule announced in these cases does not militate against the conclusion

reached here, as to the right of our courts to supervise a foreign corporation where it exists under the conditions of the respondent herein. On the contrary, these cases support our conclusion. They decide, not that a foreign corporation as such, is exempt from the supervision of our courts, but that it is so by reason of the place of its residence, location of its property, and general conduct of its business. Where these three conditions are found to exist so as to render the enforcement of a judgment impossible, then supervision is held to be unauthorized.

Elsewhere, the rule is announced under like limitations, viz., that the right of supervision by the courts will not be exercised over a foreign corporation where the location of its officers, property and accounts are without the State, and the orders and decrees of the courts cannot, as a consequence, be enforced. [*Sauerbrunn v. Hartford Life Ins. Co.*, 220 N. Y. 363, and cases cited p. 372; *Eberhard v. Northwestern Mut. Life Ins. Co.*, 210 Fed. 520. and cases cited, pp. 522 & 523.]

The right of a court of equity to appoint a receiver for, and otherwise supervise the affairs of a foreign corporation, is elaborately discussed with the citation of many cases in the report of *Low v. R. P. K. Pres. Met. Co.*, 91 Conn. 91, in L. R. A., 1917D, pp. 291-306. There is a contrariety of conclusions in regard to subordinate matters in these cases, but the general doctrine, in harmony with that announced herein, prevails.

While independently of statute a court of equity has power to entertain a bill against a domestic and, in accord with our rulings, a foreign corporation as well, under the facts in the instant case (*Cantwell v. Lead Co.*, 199 Mo. 1; *Thompson v. Greeley*, 107 Mo. 577; *Greeley v. Bank*, 103 Mo. 212; *Cox v. Volkert*, 86 Mo. 505), we are not without legislative authority in that behalf.

Under Section 3037, Revised Statutes 1909, foreign corporations doing business here are subjected to all of the liabilities, restrictions, and duties of corpora-

tions of like character organized under the laws of this State. Section 3038, Revised Statutes 1909, provides explicitly that receivers may be appointed to take charge of the business, property and effects of foreign corporations, etc.; the powers granted to the receiver being similar, if not identical, to those conferred upon receivers of domestic corporations. There is, therefore, under the pleadings and facts, no question as to the power of a court of equity to take cognizance of this case.

IV. It is contended that there was no notice of the application for temporary injunctive relief, and **Notice.** the appointment of a receiver. The proceeding here was not to stay a judgment within the contemplation of Sections 2517 and 2518, Revised Statutes 1909. While notice of applications in cases of this character is usually required; where, as in this case, the need is a crying one, notice is not held to be a prerequisite (*State ex rel. v. McQuillin*, 256 Mo. l. c. 707; *Tuttle v. Blow*, 176 Mo. l. c. 171). Equity has never prescribed the necessity of giving notice as a condition precedent in all cases of the granting of temporary injunctions, [*State ex rel. v. Woodside*, 254 Mo. l. c. 592.]

V. Notwithstanding our conclusion as to the sufficiency of the bill as a whole, we have considered respondents' special contentions in regard to the lack of certain averments, regardless of the fact that the complete lack of jurisdiction of the Court of Appeals may render these contentions beside the case. Respondents insist, with that technical minuteness characterized by an argument in support of a demurrer, that the bill is insufficient in failing to embrace the necessary allegations to sustain an order for an accounting. The established rule is that courts liberally construe pleadings for accountings, and when the allegations in regard thereto substantially make out a case this will suffice. [1 Enc. Pl. & Pr., p. 97, note 2.]

Moreover, we have frequently ruled that pleadings generally should be given such an interpretation as fairly appears to have been intended by the pleader. [Hickory Co. v. Fugate, 143 Mo. l. c. 79; Davis v. Jacksonville So. Line, 126 Mo. l. c. 78; Stillwell v. Hamm, 97 Mo. 579.] Furthermore, the bill must be interpreted by employing in its aid all reasonable inferences from the facts stated and all implications and intentions which its terms will afford, in support of any relief competent for the court to grant. [Thomasson v. Mer. Town Mut. Ins. Co., 217 Mo. 485; People's Bank v. Scalzo, 127 Mo. 164; Salmon Falls Bank v. Leyser, 116 Mo. 51.]

The charge in the bill that Burgess, a director and president of the corporation, purchased 300 shares of the stock of the company from Sterns for the use of the company, at \$40 per share, and resold 100 of such shares to one Meyer, at \$60 per share, at a profit to himself of \$2000, for which he should account to the company, is a plain and specific charge for an accounting, even good as against a demurrer.

In addition, there is the charge in the bill that Burgess and his co-defendant directors, co-operating, purchased a calendar for the company at \$17,500 and then caused entries to be made on the books showing an expenditure of \$22,000 on that account. This will authorize an accounting, because in the concluding paragraph of the bill, prefatory to a prayer for general relief, an accounting is called for on all of the charges of fraud and waste theretofore specifically pleaded.

This bill is in nowise similar to that considered by this court in Albers v. Moffitt, 262 Mo. 645. There were no data set out in that case on which an accounting might be based. There is in the case at bar.

But even though no accounting can be had on the bill save on the \$2000 item alone, it is nevertheless sufficient, for it seeks to remove Burgess, the president, from his office as director, on an allegation that he

draws an exorbitant salary of \$10,000 a year, which constitutes, as alleged, a wasteful expenditure of the funds of the company. This alone, apart from the other allegations in the bill, serves to fix the jurisdiction and supervisory control of this court.

Our conclusion is that the preliminary rule in prohibition issued by this court should be made absolute, and it is so ordered.

Bond, C. J., Graves and Woodson, JJ., concur; Faris and Williams, JJ., concur in result, and Blair, J., concurs in paragraph 1 and result.

MARY SHIELDS LAWSON and FRANK H. SHIELDS, Appellants, v. SUSAN B. CUNNINGHAM and JAMES H. LIPSCOMB.

In Banc, June 28, 1918.

1. **TRUST ESTATE: Power of Trustee to Invest, Sell and Reinvest.**
A clause of a will read: "I devise to my son J. H. Field, as trustee for my daughter Lucy B. Shields, ten thousand dollars, which I wish him to invest in some safe stock, or in any way he may think best, and to pay over for the use of my daughter Lucy, the yearly profits, which it may produce, but the principal to remain for the use of her children; in case my daughter Lucy dies leaving no children, the money to return and be equally divided between my sons." *Held*, that this language conferred upon the trustee power to invest, sell and reinvest, in personal or real estate; and when the trustee invested the fund in land, by a conveyance which named him as grantee and as trustee for the uses and purposes in the clause mentioned, a life estate in Lucy and remainder in the children was not so created that the trustee could not thereafter sell the land and invest the fund in other property. The power to sell and reinvest was not exhausted by the one investment in land.
2. ———: ———: **Ultra Vires: Cure.** Even if it be conceded that, under said clause of the will, the trustee had no power to buy land, yet any subsequent act by which the wrong was righted and the trust fund returned intact into his hands was warranted and legally unobjectionable.
3. ———: **Substituted Trustee: Power to Sell Trust Land: Estoppel.** The *cestuis que trustent*, who, with actual notice, or with knowledge

Lawson v. Cunningham.

of facts demanding inquiry, have accepted the proceeds of a sale of land by a substituted trustee, have solemnly receipted to him for the full amount of the trust fund and have enjoyed and retain the fruits of such sale, cannot be heard in a court of conscience to say that the substituted trustee, under a clause of a will giving the original trustee power to invest the trust fund in real estate, had no power to sell the land, or that the court of the foreign State appointing him had no power to approve his sale of Missouri land; and whether such doctrine of preclusion be designated as *quasi-estoppel* or is more nearly akin to ratification or election, the result is the same—they cannot, under such circumstances, recover the land.

Held, by BOND, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the facts of the case do not show that the minor *cestuis que trustent* shared in the proceeds of the sale of the trust property by the substituted trustee, or that they had notice that when it was sold the proceeds were invested in other real estate the purchase price of which, when it was sold, was divided among them, nor do they show that it was so invested, and consequently the doctrine of *quasi-estoppel* does not apply to them.

Appeal from Boone Circuit Court.—*Hon. Samuel Davis*, Special Judge.

AFFIRMED.

Finley & Sapp and *Frank G. Harris* for appellants.

(1) The will created a trust fund during the life of Lucy B. Shields, in which her children took a contingent remainder. *West v. Bailey*, 196 Mo. 517; *Wood v. Kice*, 103 Mo. 329; *Luquire v. Lee*, 121 Ga. 624. (2) Under such a trust the trust property cannot be diverted from the objects named by the donor, and neither the trustee, nor Lucy B. Shields, nor both together, nor a court, had power to convey the property and defeat the rights of the remaindermen therein. *Sampson v. Mitchell*, 125 Mo. 217; *West v. Bailey*, 196 Mo. 517; *Arnold v. Brockenbrough*, 29 Mo. App. 625. (3) There is no express power of sale given the trustee, and even if it be granted that he had an implied power of sale, it was personal to J. H. Field and did not survive to a substituted trustee. *Gamble*

Lawson v. Cunningham.

v. Gibson, 59 Mo. 595; 39 Cyc. 346, 410; De Lashmutt v. Teeter, 261 Mo. 437; Luquire v. Lee, 121 Ga. 624; Belote v. White, 39 Tenn. 703; Mitchell v. Spence, 62 Ala. 450; Hatt v. Hagaman, 33 N. Y. Supp. 5; Flint v. Spurr, 56 Ky. 499; Kennedy v. Pearson, 109 S. W. 280; Potter v. Ranlett, 116 Mich. 454; Goad v. Montgomery, 119 Cal. 552. (4) When the portion of the trust fund was invested in the real estate in controversy, such real estate became subject to the trust. Freeman v. Maxwell, 262 Mo. 21; Wood v. Kice, 103 Mo. 336. And the insertion in the deed from Jacobs to Wm. C. Shields, as trustee, in the *habendum* clause, of the added power of sale was unauthorized by the trust instrument, and therefore void. Freeman v. Maxwell, 262 Mo. 24; Clark v. McGuire, 16 Mo. 312; Henderson v. Williams, 97 Ga. 709. (5) Under the trust as declared, upon the death of the life tenant, the remaindermen would have a right of entry. Garesche v. Levering Inv. Co., 146 Mo. 449; Rector v. Dalby, 98 Mo. App. 198; Pugh v. Hays, 113 Mo. 434; 28 Am. & Eng. Ency. Law, p. 947. (6) The deed from Curtis Field, trustee, and Lucy B. Shields to Elijah A. More did not convey the title of the remaindermen. Such trustee, appointed by the circuit court of Madison County, Kentucky, had no power to convey real estate in Missouri and the deed for that reason is void, so far as the remaindermen are concerned. De Lashmutt v. Teeter, 261 Mo. 412; Case note, 69 L. R. A. 673. So far as these remaindermen are concerned, consent by William C. Shields, trustee, and Lucy B. Shields could not give the trustee power to convey or confer jurisdiction on the circuit court of Madison County, Kentucky, to convey land in Missouri. In Re Drainage Dist. v. Voltmer, 256 Mo. 162; 11 Cyc. 673; Vandevanter v. Bank, 232 Mo. 618. (7) The Statute of Limitations has no application to this case. The answer of defendant Susan B. Cunningham shows on its face that she claims by mesne conveyances from Elijah A. More; that she claims under the trust, not adversely to it. Therefore, as to her and her predeces-

Lawson v. Cunningham.

sors in title, the Statute of Limitations never commenced to run during the life of Lucy B. Shields. *Goodwin v. Goodwin*, 69 Mo. 621; 1 R. C. L., p. 754, sec. 80. The Statute of Limitations must be pleaded in order to be available as a defense. *Stevenson v. Smith*, 189 Mo. 466; *Chouteau v. Allen*, 70 Mo. 341. Furthermore, persons dealing with a trust fund do so at their peril, and purchasers from the trustee or life tenant are not innocent purchasers where the record under which they claim discloses the character of the fund or property involved, and one who acquires property with notice, either actual or constructive, that his grantor holds title as trustee, stands in his grantor's shoes and holds the property charged with the trust. *McDonald v. Quick*, 139 Mo. 498; *Turner v. Edmeston*, 210 Mo. 427; 39 Cyc. 376, 565; *Griswold v. Perry*, 7 Lans. (N. Y.) 98; *Elliott v. Machine Co.*, 236 Mo. 546; *Case v. Goodman*, 250 Mo. 112; *Canada v. Daniel*, 175 Mo. App. 1. c. 65. The interest of Lucy B. Shields and her trustee having been conveyed by them, she and her trustee estopped themselves from suing for possession of the property or the annual rents, and no limitation could run against the remaindermen by reason of the trustee being barred, even if it be conceded that the trustee held the fee simple title. *Kingman v. Winchall*, 20 S. W. (Mo.) 296; *Heaton v. Dickson*, 153 Mo. App. 312; *Pickens v. Dorris*, 20 Mo. App. 1; *Wood v. Kice*, 103 Mo. 338; *Harris v. Smith*, 98 Tenn. 286; *Security Bank v. Callahan*, 220 Mass. 84; *Boston Trust Co. v. Luke*, 220 Mass. 484; *Mannagan v. Shea*, 158 Wis. 619; 1 Cyc. 1069. In this case the trustee did not take a fee simple, but only a life estate in the fund or property, during the life of Lucy B. Shields. Therefore, since the trustee and Lucy B. Shields were tenants for life only, whatever they did or did not do could not affect the rights of the contingent remaindermen. In *Re Spreckel's Estate*, 123 Pac. (Cal.) 371; *Luquire v. Lee*, 121 Ga. 624; *Brown v. Richter*, 49 N. Y. Supp. 368; *Dresser v. Travis*, 79 N. Y. Supp. 928; *Losey v. Stanley*, 147

Lawson v. Cunningham.

N. Y. 560; *Belote v. White*, 39 Tenn. 703; *Bull v. Walker*, 71 Ga. 195, *Hill on Trusts* (4 Am. Ed.), p. 382; 39 Cyc. 212, 213; *Harbison v. James*, 90 Mo. 427; *In Re Soulard Estate*, 141 Mo. 663; *Throckmorton v. Pence*, 121 Mo. 50; *Dameron v. Jamison*, 143 Mo. 483; *Snyder v. Elliott*, 171 Mo. 362; *Starr v. Bartz*, 219 Mo. 47, 63. (8) The plaintiffs have not ratified the sale to More by taking the proceeds of the Christian College avenue property. Estoppel must be pleaded and proved as pleaded. *Turner v. Edmonston*, 210 Mo. 428; *Noble v. Blount*, 77 Mo. 242. The evidence on the plea of ratification or estoppel failed to show that the trustee invested the trust funds from the More sale in the Christian College avenue property. *Anthony v. Building Co.*, 188 Mo. 718; *Bank v. Simpson*, 152 Mo. 656; *Stokes v. Burns*, 132 Mo. 214; *Luquire v. Lee*, 121 Ga. 624. If, without knowledge of the facts and of their rights, the plaintiffs have received a part of the proceeds of the sale to More, then they should be permitted to return the same as a condition to a decree vesting title in them. *De Lashmutt v. Teeter*, 261 Mo. 447; *Sampson v. Mitchell*, 125 Mo. 232. The finding of the court on this issue was erroneous because the evidence shows that the defendant never changed her position on account of the alleged division of the Christian College avenue property proceeds. *De Lashmutt v. Teeter*, 261 Mo. 439.

McBaine & Clark for respondents; *Henry Lamn* of counsel.

(1) The trust created by the will of Curtis Field was a trust of money, to-wit, ten thousand dollars. Under the terms of the trust the trustee had implied power to sell anything he bought with the money and give good title thereto. The power "to invest" and "to pay over" the income with a provision that "the money to return and be equally divided" among other persons gives an implied power to sell anything bought with the money. The power of sale exercised by

Lawson v. Cunningham.

Curtis Field, Jr., is derived from the will. The sale is therefore valid. 39 Cyc. 351; 2 Perry on Trusts (6 Ed.), 1269; Porter v. Schoffield, 55 Mo. 303; Livingston v. Murry, 39 How. Pr. 102; Wurts v. Page, 19 N. J. Eq. 365; McCredie v. Metropolitan Ins. Co., 83 Hun. 526, 32 N. Y. Supp. 489, 148 N. Y. 761; Wright v. Mercerin, 34 Misc. 414, 69 N. Y. Supp. 936; Purdy v. Whitney, 20 Pick. 25; Powell v. Woodcock, 149 N. C. 235; Asch v. Asch, 47 Hun, 285, 113 N. Y. 232; Mendall v. Levice, 48 Misc. 271, 81 N. Y. Supp. 965; Byrnes v. Bayer, 86 N. Y. 210; Scottish American Mortgage Co. v. Massy, 94 Tex. 339; First National Bank v. Lee, 23 Ky. Law Rep. 1897; Webster v. Morris, 66 Wis. 366, 57 Am. St. Rep. 278; Burnham v. White, 102 N. Y. Supp. 717; In re Musten, 194 Pa. 437, 75 Am. St. 702; Cherry v. Green, 115 Ill. 591; Robinson v. Robinson, 105 Me. 68, 134 Am. St. 537; Harvard College v. Wells, 159 Mass. 114; Schloendorn v. Schmidt, 115 Md. 74; Boston Safe Deposit Co. v. Mixter, 146 Mass. 100; Holden v. Circleville Light Co., 216 Fed. 497. (2) The appointment of Curtis Field, who sold the land in question, was valid. While the real estate purchased by him was in Missouri, the trust fund invested in it was created by a Kentucky testator, and the fund was under the control of the circuit court of Madison County, Kentucky. The land was a part of the fund in charge of that court through its trustee. When the trustee died his successor was properly appointed for the entire fund. 39 Cyc. 287; Wheelen v. Kellner, 31 Ky. Law Rep. 1285; Dexter v. Cotting, 149 Mass. 92; Bradstreet v. Butterfield, 129 Mass. 339; Thomas v. Poole, 19 S. C. 323; Fitzgibbon v. Barry, 78 Va. 755; Haggins v. Straus, 91 Cal. 191, 25 Am. St. 171; Milbank v. Crane, 25 How. Pr. 193; Hawley v. Ross, 7 Paige, 103; Chase v. Chase, 2 Allen, 101; Curtis v. Smith, 60 Barb. 9; Donaldson v. Allison, 182 Mo. 627; Jenkins v. Lester, 131 Mass. 357; Smith v. Davis, 90 Cal. 25, 25 Am. St. 92; Pennington v. Smith, 69 Fed. 188; Breedlove v. Stump, 3 Yerg. (Tenn.) 265. (3) The appointment by the Kentucky court is not subject to

collateral attack, in this case, though it be irregular. Trusts, 39 Cyc. 288; *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 717; *Brandon v. Carter*, 119 Mo. 572; *Bredell v. Westminster College*, 242 Mo. 333. (4) The sale of the land in question, by Curtis Field, Jr., passed the fee simple title thereto, freed from the trust, to Elijah A. More. This is true though the trustee had no right under the will to buy land in Missouri or power to sell the same. The trustee in this case sold the land and actually received double the money that he paid for the land. If he acted without authority in buying he acted properly in selling and converting the land back into money. This is not a trust of a particular piece of land, but, as stated, was a trust of money. The rules where a particular piece of land is left in trust are not applicable to cases where money is left in trust, and afterwards property is bought with the money, and afterwards the property is sold and converted back into money, which is received by the trustee. Purchase of land in Missouri by the trustee was probably not authorized by the will of Curtis Field, Sr. If the purchase was not authorized the trustee had the power to sell the land which he had purchased without authority. *Ormasten v. Am-scott*, 84 N. Y. 399; *In re Reid*, 49 N. Y. App. Div. 196, 61 N. Y. Supp. 50; *Roberts Estate*, 22 Pa. Co. Ct. 4; *State v. Washburn*, 67 Conn. 188; *Newton v. Rebenack*, 90 Mo. App. 650. (5) The plaintiffs are barred by the Statute of Limitations. Where the statute has run against the trustee holding the legal title the beneficiaries are also barred even though they be under disabilities. *Meeks v. Olpherts*, 100 U. S. 564; *Trimble v. Woodhead*, 102 U. S. 647; *Ewing v. Shanahan*, 113 Mo. 188; *Walton v. Ketchum*, 147 Mo. 209; *Schiffman v. Schmidt*, 154 Mo. 204; *Smillie v. Biffe*, 2 Pa. St. 52; *Johnson v. Cook*, 122 Ga. 524; *Cushman v. Coleman*, 92 Ga. 772; *Waterman v. Waterman Hall*, 220 Ill. 567; *Edwards v. Woolfolk, Adm.*, 17 B. Mon. 376; *Chase v. Cartright*, 53 Ark. 358, 22 Am. St. 207; 1 Cyc. 1068; 2 Corpus Juris, p. 227; 1 R. C. L., p. 754. (6) Plain-

Lawson v. Cunningham.

tiffs are estopped from asserting title to the real estate in controversy. The plaintiff, Frank Shields, recognized the validity of the appointment of Curtis Field, trustee, and the sale of the property by him. He applied to the court for the appointment of himself as trustee to succeed said Curtis Field and in his application and receipt to the former trustee, impliedly acquiesced in the former sale and disposition of the purchase money. His co-plaintiff signed his bond as trustee. The plaintiffs are also estopped from asserting title to the real estate in controversy, because subsequently the real estate in which part of the money received from Elijah A. More was invested, was sold and the plaintiffs divided the purchase money among themselves. They can not receive the benefits of the sale to Moore and retain the same and repudiate the sale. *Austin v. Loring*, 63 Mo. 19; *Light Co. v. Railroad Co.*, 89 Mo. 108; *Cadematori v. Gauger*, 160 Mo. 352; *Hubbard v. Slavens*, 218 Mo. 598; *Hector v. Mann*, 225 Mo. 228; *Proctor v. Nance*, 220 Mo. 104; *McClannahan v. West*, 100 Mo. 309; *Cape Girardeau, etc. Co. v. Southern Illinois, etc. Co.*, 215 Mo. 296.

FARIS, J.—This is an action to determine title to certain real estate situate in Boone County, Missouri. Upon a trial by the court the finding and judgment were for defendants, and plaintiffs in the conventional way thereupon appealed.

The land in dispute is situate in the heart of the City of Columbia, and is a part of an eighteen-acre tract conveyed by one John J. Jacobs, to William C. Shields, trustee, on the 10th day of October, 1864, under the circumstances below set forth. In the year 1857, one Curtis Field, Sr., residing in Madison County, in the State of Kentucky, executed his will, and thereafter in the year 1863 departed this life. The only provision of this will with which we are here concerned is one which created a trust fund for his daughter. The provision so creating said fund read thus:

"I devise to my son, J. H. Field, as trustee for my daughter, Lucy B. Shields, ten thousand dollars, which I wish him to invest in some safe stock or in any way he may think best and to pay over for the use of my daughter Lucy the yearly profits which it may produce, but the principal to remain for the use of her children in case my daughter Lucy dies leaving no children, in that event the money to return and be equally divided between my sons, John H. Field, Curtis Field and Thompson Field, or their heirs."

At the time of the death of said Curtis Field, the daughter, as the clause quoted foreshadows, was intermarried with one William C. Shields, and was residing in Columbia, Missouri. The trustee named in said trust fund clause refused to act. Shortly thereafter such proceedings were had in the circuit court of Madison County, Kentucky, as resulted in the appointment of the husband of Lucy B. Shields, the said William C. Shields, as substituted trustee. After giving bond, which was approved by the Madison County Circuit Court, there was paid over to him on the 18th day of April, 1864, the full sum of the trust fund mentioned.

Shortly after the trust fund was paid into the hands of the substituted trustee, William C. Shields, he purchased from the said John J. Jacobs, in consideration of \$6000, of said fund, the tract of land in controversy. This land consisted at the time of eighteen acres, and from it the parcel in controversy was carved. There were also carved from this tract twenty-seven other lots, now worth, with the improvements thereon, from three hundred and fifty thousand to four hundred thousand dollars. Of the twenty-eight lots, seventeen have been quit-claimed by plaintiffs to the claimants or to the occupants thereof, leaving, with the parcel here in dispute, only eleven lots involved in this action or in the result thereof. The deed ran to William C. Shields, as trustee, and, omitting formal parts, and certificates, which are conventional, read thus:

"Know all men by these presents that whereas Curtis Field, late of Madison County, Kentucky, by his last will and testament dated March 10th, 1857, duly probated and recorded in said county of Madison, devised to J. H. Field as trustee for his daughter Lucy B. Shields ten thousand dollars which said trustee was by said will directed to invest in stock or in any way that he, said trustee, might think best, and to pay over for the use of said Lucy B. Shields the yearly profits which it may produce, but the principal to remain for the use of the children of said Lucy; with the further provision in said will that 'in case my daughter Lucy died leaving no children the money to return and be equally divided between my sons John H. Field, Custis Field & Thompson Field, or their heirs';

"And whereas said John H. Field having failed to qualify as trustee, William C. Shields has been appointed by the circuit court of Madison county aforesaid, and has duly qualified as trustee for said Lucy B. Shields, under the will of said Curtis Field, dec'd. and has, in pursuance of the provisions of said will, invested the sum of six thousand dollars, part of bequest and devise aforesaid for the benefit of said Lucy B. Shields, in the real estate hereinafter described:

"Now therefore, we, John J. Jacobs and Jane W. Jacobs, his wife, in consideration of the premises and of the sum of six thousand dollars, to us in hand paid by William C. Shields, trustee as aforesaid, the receipt whereof is hereby acknowledged, do hereby bargain sell and convey unto said William C. Shields, trustee as aforesaid, the following real estate lying in Boone County, Missouri, to-wit:

"Part of the Northeast quarter of Section thirteen (13), Township Forty-eight (48), Range Thirteen (13), Beginning at a point two hundred (200) links west of a stone, the quarter section corner on the west boundary of Section 18, Township 48, Range 12, and running thence west 8.10 chains; thence north 10.10 chains to a stone, the southwest corner of a lot desig-

nated on the plat of the town of Columbia as Lot No. Seven (7); thence north along the west boundary of said Lot No. 7, and part of the west boundary of Lot No. 8, 12.25 chains to the northwest corner of said Shield's land hereby conveyed; thence east along the line between the land hereby conveyed and those of G. H. Matthews 8.10 chains; thence south 22.35 chains to the beginning, containing 18.01 acres, be the same more or less.

"To have and to hold the same with all the rights, privileges and appurtenances, thereto belonging or in any wise appertaining, unto said William C. Shields, trustee as aforesaid, for the use of said Lucy B. Shields during her life, and at her death the same to descend to and vest in the heirs of the body of said Lucy B. Shields, provided that if said Lucy B. Shields die leaving no children, then said real estate to vest in and be equally divided between John H. Field, Curtis Field, Thompson Field, or their heirs; *And provided further, that it shall be competent for said William C. Shields, as such trustee, and for any future trustee, successor of said Shields, who may be thereto requested by said Lucy B. Shields, at any time, to sell and convey the above described real estate, and re-invest the proceeds thereof* according to the directions of the will of said Curtis Field, dec'd.

"In testimony whereof we, said Jacobs and wife, hereto set our hands and affix our seals on this tenth day of October A. D. 1864."

Following the purchase of the above land (which we shall hereinafter refer to as the "Jacobs land," for brevity and to distinguish it from another tract in the case), Lucy B. Shields, and her husband, William C. Shields, the trustee, resided together thereon until the death of William C. Shields, in July, 1865. Upon the death of William C. Shields, the circuit court of Madison County, Kentucky, appointed James S. Rollins, as trustee. He refused to act, and thereupon the Kentucky court appointed Curtis Field, Jr., as trustee,

Lawson v. Cunningham.

who duly qualified and took over the management of the trust fund.

In 1869, Curtis Field, the second substituted trustee, presented a petition to the circuit court of Madison County, Kentucky, praying for the approval of the sale of the Jacobs land. The Kentucky court thereupon made an order approving the sale thereof and ordering Curtis Field, as trustee, to execute a deed of conveyance therefor, and it was accordingly sold and conveyed by said trustee to one Elijah A. More, for the sum of \$12,000, by deed bearing date July 1, 1869, in which Lucy B. Shields, as *cestui que trust*, joined. This deed recites at length the salient facts of the creation of the trust fund, and except for the description and granting parts thereof, which are conventional, reads thus:

“Know all men by these presents that Whereas Curtis Field late of Madison County, Kentucky, by his last will and testament dated March 10, 1857, duly probated and recorded in said county of Madison devised to J. H. Field as trustee for his daughter Lucy B. Shields ten thousand dollars which said trustee was by said will directed to invest in stock or in any way that he said trustee might think best and to pay over for the use of said Lucy B. Shields the yearly profits which it might produce but the principal to remain for the use of the children of the said Lucy B. Shields and Whereas said John H. Field having failed to qualify as Trustee and William C. Shields having been appointed by the circuit court of Madison County aforesaid and having duly qualified as trustee for said Lucy B. Shields under the will of said Curtis Field deceased and did in pursuance of the provisions of said will invest the sum of six thousand dollars part of the bequest and devise aforesaid for the benefit of said Lucy B. Shields in the real estate hereinafter described and which was conveyed to said William C. Shields trustee as aforesaid by John J. Jacobs and Jane W. his wife and Whereas it was provided in said deed of conveyance that it should be com-

petent for said William C. Shields as such trustee and for any future trustee successor of said William C. Shields when thereto requested by said Lucy B. Shields at any time to sell and convey the said real estate purchased as aforesaid and reinvest the proceeds of such sale according to the directions of the will of said Curtis Field deceased, and Whereas said William C. Shields departed this life on the 3d day of July, 1865. And whereas I, Curtis Field was duly appointed by the circuit court of said Madison County, Kentucky, to succeed said William C. Shields deceased as trustee of said Lucy B. Shields and having duly qualified as such trustee and Whereas I am hereto requested by said Lucy B. Shields as evidenced by her signing this deed and becoming a party herein."

Under the above conveyance, through divers mesne conveyances not pertinent here, Susan B. Cunningham, the defendant, claims title. The other defendant, James R. Lipscomb, is made a party merely as the holder of a certain deed of trust; he is not otherwise interested in this title. We shall hereafter refer to Susan B. Cunningham as the defendant, and to the appellants herein as plaintiffs.

After the sale of the Jacobs land, which was consummated, as stated, by deed of conveyance dated July 1, 1869, there was purchased, for the sum of \$5,000, from one Herndon, by Curtis Field, as trustee, another tract of land, which tract we shall hereinafter refer to as the "Herndon land." The deed to the Herndon land was made, as the deed itself recites, to "*Curtis Field, trustee for Lucy B. Shields, and her children acting under the will of Curtis Field, Sr., deceased.*" This deed was dated July 1, 1869, but was not acknowledged till July 3, 1869. Forty-one days after the deed of conveyance of the Herndon land was made to Curtis Field, trustee, to-wit, on the 13th day of September, 1869, "*Curtis Field, Jr., as trustee for Lucy B. Shields, and her children,*" conveyed to Lucy B. Shields the Herndon land, for a recited consideration of one dol-

Lawson v. Cunningham.

lar. But this deed contained a further provision which is pertinent, and which reads thus:

“The main consideration of the foregoing conveyance is that the deed was made to Curtis Field, trustee, etc., by E. W. *Herendon* and Laura E. his wife, when it should have been made by them to Lucy B. Shields, she having paid for the property to *Herendon* out of her own individual profits of the trust fund received from her father Curtis Field’s estate paid over to her by Curtis Field, trustee, aforesaid.”

Light is thrown upon the recital above quoted from this deed, by the extrinsic facts shown in evidence. For the record shows that after the sale by the trustee, to E. A. More, of the Jacobs land, for the sum of \$12,000, the sum of \$6000, being, the amount of the trust fund invested in the Jacobs land, was retained by Curtis Field, as trustee. The difference, to-wit, the sum of \$6000, was, pursuant to an order of the circuit court of Madison County, Kentucky, paid over to Lucy B. Shields, as “profit on purchase and sale of house and grounds in Columbia,” as her filed receipt therefor recites.

Lucy B. Shields departed this life in the year 1910, leaving surviving her a daughter, Mary Shields, intermarried with one Lawson, Frank H. Shields and William C. Shields, Jr., who, except William Shields, Jr. (who, prior to the bringing of this suit, sold and conveyed by mesne conveyances to Mary Shields Lawson his interest in the land herein in dispute), are plaintiffs herein:

Subsequent to the purchase and payment for the Jacobs land, and on, to-wit, the 13th day of January, 1870, Curtis Field, as trustee, made a report to the circuit court of Madison County, Kentucky, in which he showed the sale of the Jacobs land, the profit of \$6000 arising from such sale, and further set forth that *the trust fund was then invested in \$4000 of the stock of the Knobnoster Savings Bank, \$2000 in Boone County Agricultural bonds, and \$4000 in bonds of the United States, together making up the full sum of the*

trust fund of \$10,000. This report was accompanied by the receipt from Lucy B. Shields, for the sum of \$6000, said therein to be profits arising from the sale of the Jacobs land.

Some five years after the making of the deed of conveyance by Curtis Field, trustee, to Lucy B. Shields, of the Herndon land, and, to-wit, on the 10th day of January, 1875, Lucy B. Shields reconveyed the Herndon land to "Curtis Field, trustee of Lucy B. Shields, etc., under the will of Curtis Field, deceased," for the recited consideration of \$2000. This latter deed, except for the name and office of the grantee, is in conventional form, and nowhere recites any other reason or consideration for the making thereof, except the consideration of \$2000 therein set forth.

Some time in the year 1875, but at what precise time does not appear, and whether before or after the making of the deed of conveyance by Lucy B. Shields to Curtis Field, trustee, does not, except by inference, appear, a report of this trust fund was filed by Curtis Field, in the circuit court of Madison County, Kentucky. This report then showed that *the trust fund* was still intact and that it was *invested in Boone County Agricultural bonds, the sum of \$3000; the First National Bank of Knobnoster, the sum of \$5000, and in "residence house and lot, Columbia, Missouri, \$2000."* Thereafter reports of the condition of this fund were made in 1876, when the full sum of \$10,000 was still shown to be in the trust fund; likewise a report was made in 1877, when a like condition was shown thereby to exist. On January 5, 1880, the report of the trustee shows that the trust fund was still on hand and invested, and intact, except that it shows that *Lucy B. Shields, was over-drawn \$2028.05*, and that there was cash deposited in some bank in the sum of \$1486.95. This report further showed that \$2000 was still invested in a house and lot in Columbia.

On the 5th day of June, 1880, the plaintiff Frank H. Shields was by the court of common pleas of Madison County, Kentucky (to which court the matter had

been in the meantime transferred), appointed third substituted trustee, "in place of Curtis Field, resigned," and the order appointing plaintiff as such trustee recites that Curtis Field, having resigned, "*is released from the duties of trustee*, and having made a settlement before the master commissioner of his accounts, and the report of the master commissioner being hereby confirmed, and *Field is exonerated from responsibility* and the cause is ordered to be filed away." Plaintiff Frank H. Shields, as such trustee, thereupon made and entered into a bond in the sum of \$2000, for the faithful performance of his duties as trustee of this fund. This bond was signed, among others, by Lucy B. Shields, the *cestui que trust*, and by Mary R. Shields, who is the other plaintiff herein.

Following the appointment of plaintiff Frank H. Shields as trustee, and on, to-wit, the 10th day of February, 1881, said Frank H. Shields, as trustee, executed and delivered a receipt to Curtis Field, as of date of August 2, 1880, wherein he recited the payment to him by said Curtis Field, of the full sum of \$10,000, of said trust fund, as follows:

"Thirty-five shares Ex. Bank St.

Louis in litigation (40 Pr. Ct.

Pd.), \$2,100.00;

(\$2,000.00) Johnston County T. P.

Bonds, 1,800.00;

Deed to house and lot Columbia, 3,290.00;

Cash check, 2,750.00;

Do. Do., 60.00."

The record shows that the above receipt, as appears from a letter from plaintiff to Curtis Field, was written by plaintiff Frank H. Shields himself.

After the appointment of plaintiff Frank H. Shields as trustee, and after the lodging by him of his receipt for the trust fund in the Kentucky court, nothing further was done in court there or elsewhere touching this trust fund, until the April term, 1910, of the circuit court of Boone County, Missouri. On the

latter date, and subsequent to the death of Lucy B. Shields, plaintiffs, together with the said William C. Shields, presented a petition to the circuit court of Boone County, reciting all the pertinent facts, and asking that Frank H. Shields be by said circuit court appointed trustee of this estate, which was accordingly done. Thereafter plaintiff Frank H. Shields qualified as trustee under the Missouri appointment, and on the 28th day of June, 1912, filed in the Boone County Circuit Court a report as trustee, wherein it appeared that he had sold the Herndon land for the sum of \$6700, and after paying certain expenses, and deducting certain money, to-wit, the sum of \$1411.20, advanced to Lucy B. Shields, *he had paid the balance to William C. Shields, to plaintiff Mary Shields Lawson, and to himself.* These payments, as appear by receipts accompanying his report and filed by him, show that each of the plaintiffs and William C. Shields received from the sale of said Herndon land the sum of \$1529.95. The Herndon land was the sole asset shown by plaintiff Shields when he made his settlement as trustee in 1912, although when he was appointed by the Kentucky court in 1880 he receipted his predecessor for the full amount of the trust fund.

Such other facts as may be deemed necessary to an understanding of this case, will be found in the opinion.

To reverse the judgment below many points are urged upon our attention by plaintiffs, and to uphold it divers propositions both of law and equity are put forward by defendant, and ably combated by plaintiffs. It occurs to us that the few questions which seem serious in the case may be discussed best and most easily by approaching the case from the standpoint of the defendant. For, if the learned trial judge has reached a just and equitable conclusion, it is our duty to sustain that conclusion if we can.

Among the propositions by which it is said by defendant the judgment *nisi* may be sustained, are: (a) that the Statute of Limitations had run when this suit

Lawson v. Cunningham.

was begun by reason of more than forty-four years' adverse possession against the trustee in whom the legal title to the land was vested, and since the trustee is barred the *cestuis que trustent* are likewise barred; (b) that by the terms of the will of Curtis Field, the power was given to the trustee to invest, and sell and re-invest the trust fund (which, it is thus in effect urged is to be regarded throughout as money only), and since the fund was invested in land and the land thereafter sold at a profit and the fund withdrawn therefrom intact, the transaction left no imprint of trust, on the land, or running with it; and (c) that plaintiffs are estopped for that they knowingly elected to take and appropriate to their own use the proceeds from the sale of the Herndon land which was bought with the identical money derived from the alleged void sale of the land in dispute. The latter proposition will be amplified and stated more at length when we come to discuss it.

For the present, at least, we pretermit any extended discussion of the effect, if any, of the Statute of Limitations to transfer, by almost half a century's possession, the title from the trustee to the defendant. We are wholly unable to see this suggestion in any light other than a flagrant begging of the question. Upon the theory of the case urged upon our attention by the defendant, the Statute of Limitations ran years ago; but upon the theory of plaintiffs, it did not begin to run at all till the death of the life tenant in 1910. When, upon consideration of other propositions in the case, we shall have decided which of these conflicting theories is correct, we shall have decided the case, without the necessity of invoking the Statute of Limitations. This for the reason that plaintiffs urge that when \$6,000 of this trust fund was invested in land, (a) no further power of sale for re-investment existed, or was residual in the trustee, or in Curtis Field, the second substituted trustee, and alleged successor in that trust, and (b) that the Kentucky court had no

power to order, or to approve a sale of land in this State, and so the investment in land was upon the facts confronting us unalterable, and had the effect to create therein a life estate in Lucy B. Shields, with remainder in fee to plaintiffs. It follows, plaintiffs contend, that the Statute of Limitations was tolled as to these plaintiffs till the death of the life tenant. If this contention is correct the statute did not run; if it is for any reason incorrect these plaintiffs can not recover, and so defendant has no need to invoke the Statute of Limitations. So, in order to save time and space we pass to the second proposition, which is, we think, perforce interlinked with the contentions of plaintiffs, touching the third one and is largely dependent thereon.

Repeating the pertinent clause of the will and italicising it for emphasis, it read thus: "I devise to my son J. H. Field, as trustee for my daughter Lucy B. Shields, ten thousand dollars, *which I wish him to invest in some safe stock, or in any way he may think best, and to pay over for the use of my daughter Lucy, the yearly profits, which it may produce but the principal to remain for the use of her children, in case my daughter Lucy dies leaving no children, in that event the money to return and be equally divided between my sons.*"

In limine, two propositions each having an important bearing upon the case are either conceded or are too plain for dispute: (1) The trust here created was an active trust, in contradistinction to a naked or dry trust, which our Statute of Uses wholly executes (*Freeman v. Maxwell*, 262 Mo. l. c. 24; *Webb v. Hayden*, 166 Mo. 39; *Pugh v. Hayes*, 113 Mo. l. c. 431); (2) the issues raised by the pleadings are such, both sides concede in their briefs, as to convert the case into one of equitable cognizance.

Did the language used in the above-quoted clause of the will confer the power to invest, sell and re-invest; to buy "safe stock" or other profit-producing commodities or securities, as the trustee might "think best," and to sell the same, if, in the judgment of the

trustee, the interest of the trust estate so required? If it did, were lands contemplated by the testator as among the things which, by the broad language used, the trustee might be permitted to buy? We think both of these questions must be answered in the affirmative. The clause, while seeming to voice precatory advice to prefer safe stocks, yet by a further clause left the character of the investment wholly to the judgment and discretion of the trustee. But the construction thus put upon the will is not decisive of the case for the two chief contentions made by plaintiffs cut even deeper than this. In effect they urge that even though the will might have given the original trustee power to buy and to sell securities and to re-invest the proceeds, or even to buy lands, it is yet a *non-sequitur* to argue from this that Curtis Field, the second substituted trustee, had the inherent power, or that he got power under the orders and approval of a Kentucky court, to sell lands situate in Missouri, which had been thus purchased.

We understand both sides to agree that the circuit court of Madison County, Kentucky, had plenary power to appoint William C. Shields trustee. Of course, since he is as to both parties the common source of title, neither side may be heard to question his authority to buy this land; they can only question the power of a second substituted trustee to sell it. Plaintiffs are of necessity compelled to ratify his act in buying the land in controversy and to concede in effect that he had the authority under the will to buy it. For we think it must be granted that if his act of buying the land was wholly *ultra vires*, and an unwarranted use of the trust fund, then any subsequent act by which the wrong was righted and the trust fund returned intact into the hands of the trustee was warranted and legally unobjectionable. It is apparent that we are here concerned only with the sum of six thousand dollars of this trust fund which was actually invested in the Jacobs land; with the remainder of the fund we have nothing to do, and except for the mere casual

use of this remainder as a component part of a simple sum in addition, in order to ascertain if the six thousand dollars ever subsequently got out of this land and got safely back in this fund, we need not hereafter again consider this balance of four thousand dollars.

Defendant doubts, and mildly voices that doubt in her briefs, whether William C. Shields, as trustee appointed by a Kentucky court to administer a Kentucky cash trust fund, had the legal right to invest that fund in the lands of a foreign State. We do not need, in the view we take of this case, to discuss this question. Pursuing it but a moment further, however, for the purpose of casting, if possible, a little more light upon the equities and upon other questions which we deem vital and which we find it necessary to consider, it is fairly obvious that the doubtful clause in this will by which the trust was created was construed by all parties as permitting this fund to be invested in land situate in a foreign State. By William C. Shields, trustee, because he did so invest it; by Lucy B. Shields, because she took possession of the land and made her home on it, both before and after she was discoverd and took the surplus of \$6000, as profits when it was sold; by the circuit court of Madison County, Kentucky, because it approved the purchase (as well as the subsequent sale) of the land; by the plaintiffs themselves, because they both ratified it and accepted, either as trustee or *cestuis que trustent* (or both), the proceeds of the sale of land bought with money derived from the subsequent sale of the Jacobs land with imputed knowledge of the source thereof; and even by Jacobs, the vendor of the land, for he, in effect so states in his deed of conveyance of it to the trustee. Likewise, as the record shows, the Kentucky court and all of the above parties took the view that the fund was, by the terms of the will, to be administered by a foreign court. The doctrine that the construction of an ambiguous contract, or other dark and obscure writing enjoining mutual action, may be aided by the interpretation put upon it by those

Lawson v. Cunningham.

charged with the duty of acting under it, is well settled. [State ex rel. v. Gordon, 266 Mo. l. c. 412; Knisely v. Leathe, 178 S. W. 453.] But we merely mention the rule *arguendo*; we do not need to, nor do we, rely upon it as a decisive doctrine of the case. For the chief point of contention here is, not whether the first substituted trustee had the power to buy the land; it is, we repeat, whether, after it was bought, the second substituted trustee had the power to sell it.

As our statement of the case discloses, William C. Shields, the first substituted trustee, died in 1865, only a year after he bought the land. The court of Madison County, Kentucky, appointed James S. Rollins, as trustee, but on his refusal to act, and on September 20th, 1866, one Curtis Field, a son of the settler and the maternal uncle of these plaintiffs, was appointed by the Kentucky court as the second substituted trustee. We have seen also from the statement of the case that upon petition filed, containing reasons which the circuit court, of Madison County, Kentucky, evidently deemed valid and sufficient, Curtis Field, as second substituted trustee, was permitted to sell the land in controversy, which he accordingly did and got therefor \$12,000, being exactly twice the sum originally paid therefor out of the trust fund, and leaving in the hands of said Curtis Field, as trustee, the sum of \$18,000 as the then sum of the trust fund and accrued profits therefrom.

It is fairly obvious that there are no vital differences as between the respective contentions of plaintiffs and defendant, which are not easily solvable, or reconcilable, save and except the validity of the sale of the Jacobs land. And upon this, of course, the whole case turns. Touching the validity of this sale by Curtis Field, acting as trustee, two serious contentions are strenuously urged by the plaintiffs. These are substantially : (1) There was no authority inherent in Curtis Field, as second substituted trustee, to sell this land, i. e., neither the terms of the will itself, nor the applicatory law, gave him such a power, and

(2) the order approving the sale thereof made by the circuit court of Madison County, Kentucky, was wholly void, because that court could make no order and render no judgment, which could in any way affect the title to real estate situate in the State of Missouri. These, particularly the last one thereof, are serious contentions as matters of law. The first turns wholly upon a question of fact, viz., the terms of the will itself. But we think the facts before us obviate the necessity of our passing upon either of them. This for the reason that we are of the opinion that the doctrine of estoppel as announced by this court in the case of *Hector v. Mann*, 225 Mo. 228, and others apposite, but not so precisely in point, precludes plaintiffs from setting up or urging the invalidity either of the appointment of Curtis Field as second substituted trustee, or the invalidity (for any reason) of the sale of the land made by Field to More, under the order of approval of the Kentucky court, or under the authority of the will itself. [*Proctor v. Nance*, 220 Mo. 104; *Cape Girardeau, etc., Railroad Co. v. Bridge Co.*, 215 Mo. 286; *Fischer v. Siekmann*, 125 Mo. 165; *Clyburn v. McLaughlin*, 106 Mo. 521; *McClanahan v. West*, 100 Mo. 309; *Boogher v. Frazier*, 99 Mo. 325; *Nanson v. Jacob*, 93 Mo. 331; *Austin v. Loring*, 63 Mo. 19.] That such a doctrine may be more nearly akin to ratification or election than to estoppel, as the well-known elements of this ancient doctrine are found in the books, may be frankly conceded, but the efficacy of the facts as a defense to bar recovery, by whatever name designated, is well-recognized both in the case-law and in the text-books. [*Hector v. Mann*, *supra*, and cases cited above; 16 Cyc. 784, 787; 10 R. C. L. 694.] Fully recognizing the latter criticism as well as clearly stating the applicable doctrine, it was said in the case of *Hector v. Mann*, *supra*, at page 24:

“Conceding that the deed was prematurely made under the present record, yet it does not follow that plaintiffs were entitled to a decree determining and vesting title in them or any of them. They are con-

fronted with the fact that they received the fruits of a judicial sale and now seek to repudiate the sale. They say they did not knowingly accept the proceeds of a sale in partition. But the record is against them. The sheriff's letters sent respectively to them refer to their interest in the 'Gowah Stewart estate,' to Mrs. Hector's 'dowry' and a commutation of the same, to the respective interests of the heirs in land sold at a term of the circuit court, to the fact that subrogation was 'decreed' and that a receipt was demanded to 'file in court.' If we recur to the receipts they sufficiently indicate that the money distributed arose from a 'partition' sale. They say so in so many words. If defendants did not know the meaning of all the terms used, they were sufficient to put them upon inquiry and they made none. The record does not show they were illiterate people, unfamiliar with the use of fair English words indicating a proceeding in court, a judgment, sale and distribution of proceeds to heirs, and it would be dangerous to justice to permit a mere statement from a witness that he did not understand or did not know what was plainly told him, to overcome the force and effect of such documentary evidence.

"But it is argued that in order to operate as an estoppel the purchaser should have known and relied upon the receipt of the purchase money and changed his situation to his disadvantage because of such reliance. I cannot agree such argument is sound. There are estoppel and estoppels and some forms of them are so defined by law-writers and jurists as to make one element in the estoppel the knowledge and reliance of one party upon the acts and conduct of the other—for instance, estoppel *in pais*, arising from misrepresentation by word, act, conduct or silence. But there are other forms of estoppel in which knowledge of the fact upon the part of the person invoking the estoppel, and reliance upon the fact and a change of situation based upon that reliance, is not an element. It may be that 'estoppel,' speaking with precision, is the wrong designation and that in attempting to classify and give

names the doctrine we are about to invoke is improperly classified as 'estoppel' and that it does not come under that head but springs from election, ratification, affirmance, acquiescence, acceptance of benefits or what not. It is classed, however, by law-writers under the head of 'quasi-estoppel.' [Bigelow on Estoppel (5 Ed.), p. 693; 16 Cyc. 787, 784 *et seq.*]

"Says Bigelow: 'Many of the cases upon this subject, it will be noticed, are simply cases of ratification or acquiescence; and it is a questionable use of terms, as we have seen, to apply the word "estoppel" to them. A few more cases will serve to enforce this observation. Thus, if heirs of age join in a deed of quitclaim with a trustee of the ancestor's real estate, to complete title made by a previous deed executed by the trustee, it is said that they will thereafter be "estopped" from contesting the validity of that earlier deed. So if a man assent with knowledge of the facts to the appropriation of an officer of the law of moneys arising from a judicial sale, he will be estopped thereafter from objecting.'"

With this rule of law before us how stands this case upon the facts? The learned chancellor below evidently found, as well he might, that a part of the profits accruing to Lucy B. Shields, from the sale of the Jacobs land, constituted the whole of the purchase-price of the Herndon land, which the plaintiffs sold after the death of Lucy B. Shields and divided the proceeds among them and the other heir, William C. Shields, Jr. That such was the fact, we think is upon this record too plain for doubt or dispute. The only question possibly to be mooted is whether this division was made by plaintiffs and the other heir with knowledge, or notice of facts imputing knowledge, of the source of the money with which the Herndon land was bought. What are these facts?

The deed from Herndon to Curtis Field, as trustee, so designates him and clearly recognizes him as such trustee. This deed was in plaintiffs' chain of title. The deed from Curtis Field, as trustee, to Lucy B.

Lawson v. Cunningham.

Shields, bearing date of September 13, 1869, recites that "the deed was made to Curtis Field, trustee, etc., by E. W. *Herndon* and Laura E. his wife, when it should have been made by them to Lucy B. Shields, she having paid for the property to *Herndon* out of her own individual profits of the trust fund received from her father Curtis Field's estate, paid over to her by Curtis Field, trustee, aforesaid." This deed was likewise in plaintiffs' chain of title. This identical land had been, as the statement of the case discloses, conveyed only forty-one days before for the identical consideration of \$5000, to "Curtis Field, trustee for Lucy B. Shields and her children, acting under the will of Curtis Field, Sr., deceased." Since these two deeds are within plaintiffs' chain of title to this *Herndon* land, we think they are bound to take notice of the facts stated therein. But this is not all. If we take the other view, that the purchase price of the *Herndon* land was not paid by Lucy B. Shields, out of money which she got from the trustee as profits from the sale of the *Jacobs* land, but that it was bought as the deed therefor from *Herndon* to "Curtis Field, trustee for Lucy B. Shields and her children, acting under the will of Curtis Field, Sr., deceased," sets forth, then this deed is also in the plaintiffs' chain of title. In either view the fact appears that the *Herndon* land was bought with the money derived from the sale by Curtis Field, of the *Jacobs* land. Whether it was in fact bought with \$5000, out of the \$6000 which Curtis Field got therefrom, or with a like sum out of the \$6000 which Lucy B. Shields got therefrom, we regard as immaterial. Moreover, whatever title plaintiffs had to this land came to them from deeds which recited that Curtis Field was the trustee. For if this money came out of the sale of this land, and if the muniments of title in plaintiffs' chain of title indicate this, it was enough to put plaintiffs upon their inquiry, which inquiry would have developed facts showing, beyond cavil, that the purchase price of the *Herndon* land was so derived. It may be difficult after the lapse of

forty-four years, and after the trustee has been in the grave for almost a generation, to so reconcile the conflicting language of the several conveyances by which the title to the Herndon land got out of Herndon and into the trustee, as to say with certainty which fact is true, but if plaintiffs were put upon their inquiry by the language of these, or of any of these muniments of title, that inquiry would we think inevitably have shown the origin of the money which was used to buy the Herndon land. The record is so full of facts to show this, and other acts of plaintiffs from which quasi-estoppel arises, that we can not take space to recite all of them. (a) The deed from Herndon was *acknowledged* on July 3, 1869; (b) on the self-same day, More, the vendee of the Jacobs land, paid into the bank to the credit of Lucy B. Shields, the sum of \$5000; (c) on this same day Lucy B. Shields paid over to E. W. Herndon the sum of \$5000; (d) there was on file among the trust fund case papers in the Madison County (Kentucky) Circuit Court an appraisal of the Jacobs land which was sold, and of the Herndon land which was bought, in which the Herndon land was described as having been "*bought by Field as trustee, from E. W. Herndon, at \$5000;*" and (e) it was said by the appraisers that they regarded the latter purchase "as judicious and for the advantage of the trust fund." *All this in corroboration of the language of the deeds themselves.* When plaintiff Frank H. Shields came of age, Curtis Shields, the second substituted trustee, asked to be relieved from the further burdens of this office, and requested the Kentucky court to discharge him and appoint said plaintiff. Plaintiffs procured the appointment thereupon of Frank H. Shields, as trustee, and both plaintiffs executed a bond for his faithful performance of the duties as such trustee. This bond recited that plaintiff Frank H. Shields has "been appointed as trustee of Lucy B. Shields, in place of Curtis Field." While this bond does say that Curtis Field was "removed," this was not in accordance with the facts as the solemn

Lawson v. Cunningham.

court records show them, and if the word "removed" means other than that Curtis Field *was discharged pursuant to his own request* it is erroneous utterly, or else the word is loosely used. Frank H. Shields gave a receipt to Curtis Field, in which, as the paper itself which we set forth in our statement shows, he, as third substituted trustee, acknowledged the receipt of the full sum of \$10,000, principal of the trust fund. His receipt also shows that \$3290 was invested in the "House & Lot, Columbia," the deed to which he acknowledges he received. Later, both plaintiffs, after the death of Lucy B. Shields, petitioned the circuit court of Boone County, Missouri, to appoint Frank H. Shields, trustee of this fund. In that petition they state that "one Curtis Field was thereafter appointed trustee by the circuit court of Madison County, Kentucky, but that the said Curtis Field is now dead; your petitioners also state that no person has been appointed trustee for the said Lucy B. Shields, nor for her children, since the death of said Curtis Field." This statement is of course palpably erroneous, for Frank H. Shields had, thirty years before, been appointed trustee by the Kentucky Court of Common Pleas.

Can plaintiffs under this state of facts, comporting notice and demanding inquiry, when inquiry would unerringly have led to knowledge, after selling the Herndon land and partitioning the proceeds among them, and William C. Shields, be heard in a court of conscience to assert that their title to the Herndon land came through one who was not a legally appointed trustee? Can they be heard to urge that Curtis Field, in the sale of the Jacobs land, and in the purchase of the Herndon land, was, in a way of speaking, a trustee *ex maleficio*? Can they, after recognizing Curtis Field as a lawful trustee, and after solemnly confessing the receipt from him intact, of the trust fund in the full sum of \$10,000, be heard to urge that he was not a trustee, but that illegally assuming so to act, he dissipated this fund, and they should now be permitted to pick and choose any property in which it was ever

invested? Can they, after taking this money from him, and after selling the land in which a large part of the proceeds of sale of the Jacobs land was invested, be heard to urge that they are entitled to have the Jacobs land also, because for a season this money, which they confess receipt of, the money which bought the land which they sold and enjoyed, was once invested therein? We think not.

It is true that by a conveyance, likewise in plaintiffs' chain of title, from Lucy B. Shields, to Curtis Field, trustee, and bearing date January 10, 1875, the Herndon land is conveyed back to said Curtis Field, for a recited consideration of \$2000. No reason is set forth in this conveyance for making the same, except the recited consideration alone. We can only speculate as to this reason. The most plausible inference in explanation of it is, that it was to secure a fresh advance in cash out of the principal of the trust fund, and that it had no relation to any antecedent transaction. Corroboration of the latter inference is to be found in the fact that on September 18, 1870, five years before this last deed was made back to Curtis Field, and some six months after the Herndon land was bought and paid for, Field, as trustee, made and filed a report to the Kentucky court, in which he says that *there was on hand in the trust fund and invested in bank stock, in Boone County bonds, and in bonds of the United States, the full sum of \$10,000. He mentions no land in this report.* But in the next report made by him in 1875, showing the condition of the fund "from the year 1875," and filed, we may therefore safely assume after January 10, 1875—the date of the above deed to him—he does report that *\$2000 are invested in a house and lot.* Also, there is offered by the testimony of plaintiff Frank H. Shields a modicum of corroboration to the view that this deed was so made in order to secure a fresh loan out of the principal of this fund. For he says that Curtis Field was in the habit of permitting Lucy B. Shields to overdraw, and

that the witness continued to allow her to do so after he became trustee.

In this state of facts, what was said by GANTT, J., in the case of *Proctor v. Nance*, *supra*, at page 114, seems peculiarly apposite:

“When those who are entitled to avoid a sale adopt and ratify it, equity will estop them from afterwards setting it aside. When a sale of land is made no person can be permitted to receive both the money and the land. And it has been held, in the application of this principle, that it makes no difference whether the proceedings under which the sale occurs are avoidable or wholly void, in consequence of the want of jurisdiction. In 2 Smith’s *Lead Cas.* (5 Am. Ed.), p. 662, the author says that when those who are entitled to avoid a sale adopt and ratify it, by receiving the whole or any part of the purchase money, equity will preclude them from setting it aside subsequently, for reasons that are too plain for statement. [*Stroble v. Smith*, 8 Watts, 280; *Commonwealth v. Shuman’s Adm’rs.*, 6 Har. 343; *Smith v. Warden*, 19 Pa. St. 424.] ‘When a sale is made of land,’ said LEWIS, J., in *Smith v. Warden*, ‘no one can be permitted to receive both the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired. It was held by this court, in *Commonwealth v. Shuman’s Adm’rs.*, that equitable estoppels of this character apply to infants as well as to adults, to insolvent trustees and guardians as well as to persons acting for themselves, and have place as well when the proceeds arise from a sale by authority of law as when they spring from the act of the party. A party will not be allowed to indulge in bad faith and make innocent purchasers the sport of his tricks. When a sale is void the reception of the purchase money renders it valid. [*Adlum v. Yard*, 1 Rawle, 171; *Furness v. Ewing*, 2 Barr, 479.] These principles are founded on elevated morals, common honesty and pure good faith, and are co-extensive with the principles of the michief

which they are designed to counteract. . . . In this case the defendant Nance had the means of knowing whether the proceedings in the tax case were valid or void and so far bid at his peril, but he paid his money in good faith, and Hall, with knowledge that the defendant had bought and paid for the land and that this purchase money had gone to the satisfaction of the taxes on the land, demanded and received the surplus from the treasury, and thus must be held to have ratified the sale."

Other facts in evidence making for *quasi*-estoppel, and precluding recovery, can be found in this record; but we are of opinion that those set down ought to suffice in a court of equity, and that further discussion would only serve to lengthen the opinion without adding appreciable light or strength thereto.

Let the judgment of the circuit court be affirmed. *Walker, Woodson and Graves, JJ.*, concur; *Bond, C. J.*, dissents in a separate opinion, in which *Blair and Williams, JJ.*, join.

BOND, C. J. (dissenting)—I am constrained to dissent from the conclusion of my learned brother FARIS that plaintiffs are estopped from the assertion of title to the lands in dispute by the facts shown in the record.

They have been set forth with so much clarity and completeness in the opinion of the commissioner filed in Division One, that I adopt, as an expression of my views, what is said by him in discussing that question. In stating the facts and rules of law governing that point, the learned Commissioner with a slight verbal change said:—

"He was appointed trustee by the Kentucky court, to succeed William C. Shields, in September, 1866. In March, 1868, he reported to that court that \$6000 had been invested, before his appointment, in the Columbia land, on which there was an excellent dwelling, that Mrs. Shields and her children were in possession of the same and that it had doubled in value. He also reported that the remaining \$4000 of the fund was invested

Lawson v. Cunningham.

in four United States registered 5-20 bonds, that Mrs. Shields desired that one of these be sold and the proceeds appropriated to improvements on the house and grounds, and suggested that the remaining bonds be sold and the proceeds invested in Madison County railroad bonds. He also asked that, as he contemplated removal from Kentucky, another trustee be appointed. The court permitted the sale of one of the bonds for the improvement of the real estate, but refused to permit the sale of the others, or to appoint a new trustee. On July first, 1869, the trustee reported that in compliance with the wishes of Mrs. Shields he had sold the real estate for \$12,000, which the court approved, and ordered that he pay \$6000 of the amount to Mrs. Shields as profit under the will. Of the remainder of the money received \$4000 was invested in a stock of the Knobnoster Savings Bank, in Missouri, and \$2000 in Boone County Agricultural bonds. This, with the \$4000 United States bonds, constituted the fund in the trustee's hands on January 13, 1870. In 1880 the trustee was called upon by the court for an accounting and reported that in 1875 the fund consisted of the following investments: Boone County Agricultural bonds, \$3000; First National Bank of Knobnoster, \$5000; residence house and lot in Columbia, \$2000; total, \$10,000. He explained that the property described as the "residence house and lot, Columbia, Missouri," cost five thousand dollars, two thousand of which came from the trust fund and three thousand of which was paid by Lucy B. Shields, and that one thousand dollars was paid by her for improvements. This was untrue, as shown by the recital in his deed of September 13, 1869 (conveying to her the same land), that she had paid the *entire* purchase price "to Herndon out of her own individual profits of the trust fund" and that the deed should have been made by Herndon and wife directly to her. It is also shown to be untrue by his report of sale filed in the Kentucky court in 1869, in which he states that he had invested the entire six thousand dollars coming to the fund from More, in \$4000 of

stock of the Knobnoster bank and \$2000 of Boone County bonds. These things cast us headlong into the mire of speculation as to why, five or six years after this money had been received and invested, he should call upon his sister to convey to him her home to carry in his accounts for two thousand dollars. There is no intimation in the record that he actually paid her any part of the amount arising from the sale of the four thousand dollars of United States bonds on September 28, 1870, and as for the securities in which the More money was invested, they remained intact in the fund. Had Judge Field, in this accounting, charged that the deed from his sister had been made to secure him for an advancement to her of two thousand dollars from the proceeds of the sale of the Government bonds, it would have been difficult at this late day to detect the deception, but then the whole transaction, including the securities themselves, was before the court, and the commissioner charged with the audit, had he been ever so friendly, could not have overlooked it. We are constrained to believe, and so find, that Mrs. Shields received nothing from the trust fund for the deed to her home property, which was afterwards carried as a two-thousand-dollar item in the account of the trustee. This will appear more plainly from the accounting made by Judge Field in 1880, in evident preparation to shake from his shoulders, as completely as possible, the responsibility with which he had charged himself in assuming this trust. We must bear in mind that it is not the trust fund that is involved, but only the item of six thousand dollars arising from the purchase money paid by More, and which was invested in Knobnoster bank stock (\$4000) and Boone County Agricultural bonds (\$2000). In 1876 the Knobnoster bank was in liquidation, the \$5000 of its stock held in the trust fund finally became a total loss, the Boone County bonds (\$3000) disappeared from the fund, and \$1800 of Johnson County bonds, and \$3500 of stock in the Exchange Bank of St. Louis, were taken in. The process of depletion continued. The Johnson County

Lawson v. Cunningham.

bonds were defaulted, as to both principal and interest, and the Exchange Bank went into liquidation, and sixty cents of its par value (\$2100) became a total loss. There being no income, Mrs. Shields had been compelled to overdraw "for the money to buy meat and bread for herself and children."

On March 29, 1880, Frank H. Shields, then twenty-one years old, was, on the application of Curtis Field, appointed by the Kentucky court trustee and gave the following receipt:

" 'Columbia, Mo., Feby. 10th, 1881.

" 'Received of Curtis Field (Aug. 2, 1880), trustee for Mrs. L. B. Shields:

" 'Thirty-five shares Ex. Bank of St. Louis, in litigation (40 Pr. Ct. Pd.) \$2100; (\$2000) Johnson County T. P. bonds \$1800; deed to house and lot Columbia \$3290; cash check \$2750; do do \$60; \$10,000.

" 'FRANK SHIELDS, *Trustee.*'

"This is the only act he is shown to have done under this appointment except to file his bond.

"At the time of his appointment as trustee Curtis Field received the trust fund as it had been invested by his predecessor in Columbia land and Government bonds. His investments had all been unfortunate, so that at the time of his resignation Mrs. Shields, his beneficiary, was absolutely without means, from the income, to buy meat and bread, and he had been compelled to advance her \$1347.05 from the principal for that purpose. It was natural that Judge Field should desire to unload, and fortify himself against responsibility to the ultimate owners of the dissipated fund. Frank, the oldest of these, had just arrived at the age of twenty-one years, while his two younger sisters, both living at the time, were, we presume, past eighteen. His legal instinct told him that if he could secure a release from these, only William, then a child a eleven, would remain a menace to him. It was under these circumstances, though not, of course, avowedly for the purpose concealed in them, that he secured the

appointment of Frank, and the signature of his sisters to his bond. The entire fund for which his receipt was given was worthless or discredited, with the exception of the cash in bank, and the so-called debt secured on the mother's home, which had been increased, for that purpose, to \$3290. The money was paid over to the mother, as might have been and probably was expected, to buy meat and bread, which she so sorely needed, and for which the provision made by her father had failed without fault of herself or her children. The Kentucky court, having apparently accomplished what it considered to be its duty, let it drop, and whatever hope may have been entertained of saving something from the investments does not seem to have come to fruition so far as this record shows.

"Soon after their mother's death her three living children filed in the circuit court for Boone County, Missouri, a petition in which they recited the appointment by the Kentucky court of Curtis Field as trustee; that he was dead, and that no successor had been appointed, and asked the appointment of Frank H. Shields as "trustee for Lucy B. Shields and trustee for the children of said Lucy B. Shields." This was evidently done upon the theory that the title to the Herndon lot, her only estate, was in Curtis Field, and that the appointment of a successor to convey it was necessary. In June, 1912, Frank H. Shields filed a report as such trustee, showing that he had sold the lot for \$6700, out of which the children had received \$1529.95 each, making a total of \$4589.85.

"It is from these facts, and such explanatory matters in the record as we shall refer to, that we are to determine this question.

"At the time of the purchase by which More became constructive trustee of the trust fund so far as it was represented by this land, the children were infants, ranging from four to ten years of age. The deed which he received gave him ample notice upon its face, of the trust with which the property was charged, and for that reason, apparently, he required the personal war-

Lawson v. Cunningham.

ranty of Mrs. Shields, but not of the trustee, to stand behind his title. He knew that he had purchased the life estate of Mrs. Shields at the most, and this knowledge was charged by law upon each person claiming title through him, including Cunningham. Up to the time of the appointment in 1880 of Frank Shields to the trusteeship there is no suggestion of anything which would forbid or make inequitable the assertion of an honest title in the children of Mrs. Shields whenever their mother should die and their contingent remainder should take effect by the will of the common testator and not by any act of hers. They knew, in contemplation of law, that Mrs. Shields and Field had no more right to convey or affect the title in remainder than strangers. Estoppel, when invoked as a muniment of title to land, either legal or equitable, is a fact to be proved by the same weight of evidence required to establish any other fact for the purpose of destroying the paper title required by the Statute of Frauds. It will not be presumed, and we see nothing in the record which suggests that these plaintiffs, or either of them, up to the time Frank H. Shields became of age and suffered himself to be appointed, so far as the Kentucky court could confer the appointment, to the trusteeship of this testamentary fund, said or did anything which could mislead any purchaser or claimant to his detriment. Even had they been of mature age during all this time the law would impose upon them no duty to devote their activities to the task of preventing potential purchasers from mistaking the legal status of this title. Their own interest was contingent, depending upon facts of life and death which could not ripen into certainty until the decease of their mother, and they were at liberty to devote all their energies to earning a livelihood in other fields until that should occur. We are not now holding that it would not be their duty to speak the truth if requested to do so by one contemplating purchase, even to the extent of employing counsel to instruct them in all the intricacies of

the many-sided title presented here. It will be time for that when such a question shall be presented.

"We are not disposed to look upon the action of Frank Shields and his sisters in the matter of his appointment by the Kentucky court in 1880 as such an acquiescence in the attempted sale of their interest by their mother and Curtis Field as should close their mouths upon the truth. It is impossible to read the record of that transaction without arriving at the conclusion that this matter was arranged for the purpose of getting Judge Field out of an embarrassing situation. He tells us in his report to the court that his investments had been such as to leave his sister without bread and meat. During his administration of the fund she had encumbered her home to the extent of \$3290 to assist him in carrying the principal of the fund for which Frank receipted. That liability of his mother, \$1800 of defaulted bonds and \$2100 of the worthless residuum of the assets of an insolvent bank, which he had just skimmed of its dividends to the extent of \$1400, constituted the principal part of the fund for which the receipt was given. We do not think there is anything in this appointment and receipt which amounted to acquiescence in the act of his predecessor in attempting to sell any interest in this land other than Mrs. Shield's interest. The life estate passed by the sale and the purchase money had been paid into this fund, and it had become the duty of the trustee who participated in the sale as such to administer either the fund or its proceeds. No action would lie in favor of her or her trustee to recover the land, because they had conveyed the possessory right to the purchaser, and had left to themselves no interest which could constitute a ground for relief on their part. Nor could the children intermeddle, for their interest had not been disturbed or injuriously affected. The sale had been consummated without intermeddling or any right to intermeddle on their part. Had Mrs. Cunningham talked with the Shields children before her purchase in 1893 and had they then told her that they had no

Lawson v. Cunningham.

title in remainder and that she could safely purchase, another situation would have presented itself. Had she talked with them after her purchase their statements to the same effect would have been valueless to her unless and until she should change her position by acting or failing to act in consequence of such assurance. This question was fully examined by us in the *De Lashmutt* case, 261 Mo. l. c. 440-443, where the Missouri cases which settled it were cited and examined at length, and we would not be justified in incumbering this opinion with its repetition.

"If it be said that at all times since the passage of the Act of 1894, the plaintiffs, although not having any possessory right, might have brought their suit to obtain a judicial determination of their contingent interest, it is answered by the fact to which we have adverted in the preceding paragraph, that the law did not give to More and his successors in title the right to force them to this trouble and expense, and by the further fact which would seem to be conclusive of the equities between them, that these purchasers, knowing from the beginning that their title was defective, had the same right to proceed under the same statute for the same relief. Applying these principles, we see nothing in the failure of the parties or any of them up to the time of the death of their mother, to assert such rights in the property as ripened upon the contingency of their survival.

"Another question arises upon the facts relating to the distribution of the mother's estate after her death. There is no rule of equity more firmly settled and more just and reasonable, than that one who knowingly receives the purchase price of his own estate sold by one assuming to act under a valid power, estops himself, in equity, from denying the power. Is that rule applicable in this case? In answering this question we start with the assumption that Mr. Shields took the land from Jacob charged with the trust created by the will for Mrs. Shields for her life, with contingent remainder in fee to her children. Her title included,

as the event demonstrated, the right of possession during the entire period of forty-five years which elapsed until her death. This passed to More by the deed, and to his successors in such title. The twelve thousand dollars received was equally divided by her and the trustee who assumed to represent her, into principal and profit, and out of the half called profit, which was paid to her by the trustee, she purchased, for five thousand dollars, and improved the lot, on which she resided at the time of her death. As between her and her children, this was her own as *effectually* as if it had been purchased with the proceeds of rents collected by her during her lifetime. As for More, he had elected to take her covenant of title, which estopped her as to her own life interest, and secured him with respect to the entire fee. The estoppel expended itself upon his forty-five years of possession. The covenant is still in force if broken, and not barred by the Statute of Limitation, but it has not been made a feature of this controversy.

“Under these circumstances it does not lie in the mouth of More and those representing him in title as constructive trustees under the Curtis Field will, to say that the whole or any part of the six thousand dollars paid to Mrs. Shields absolutely for her life estate according to the terms of the will under which they claim, should now be repaid by her children whose interest had not been included in the deal which produced it. That it was not intended to be so included is clear. It follows that they have not estopped themselves by participation in the distribution of their mother’s estate as her heirs. In this distribution they took directly from their mother, and not, either directly or indirectly, from their grandfather.

“Nor have the respondents sustained by the evidence the burden of showing that any of the other six thousand dollars of the purchase price was invested in the Herndon land. The self-serving statement made in the Kentucky court by Curtis Field more than five years after the purchase, that two thousand dollars of the

price had been paid out of the trust fund, is not evidence against these plaintiffs. If it were, its falsity appears in the recitals of his own deed upon which the legal title of Mrs. Shields stands. It also appears by his report to the court made at the time. His accounts, taken in connection with this fictitious statement, leave no doubt in our mind that the deed of Mrs. Shields, made at the time of the statement, by which she conveyed to him the same land for an expressed consideration of two thousand dollars, a sum which bore no relation to its value, was made for the purpose of helping her brother out of the trouble in which he had involved himself by having dissipated the trust fund in bad investments. She was destitute, as he told the court, of money with which to buy the simplest food, but what she had she freely gave. She bent her back, and permitted him to load it with his own burden.

“Nor does the evidence impress us that Frank Shields, as trustee, ever received a dollar of the six thousand for which their interest in the land was attempted to be sold to More. Immediately after the sale was consummated, the trust fund consisted of that sum, received in cash, and four thousand dollars well invested in United States five-twenty bonds. With the last item we have nothing to do. It is a side issue. He immediately invested the six thousand dollars in four thousand dollars of Knobnoster bank stock, which was lost as effectually as if it had been burned, and two thousand dollars of Boone County Agricultural bonds, which are not traced into the hands of his successor. Five years afterward (1875) he had sold the United States bonds, and with their proceeds purchased another thousand dollars each of the Knobnoster bank stock and the Boone County bonds, and balanced the account with the two thousand dollars from Mrs. Shields by her conveyance of her home property. It will be seen that this latter transaction had no connection with the investment of the six thousand dollars received from the sale to More, and that if she received this two

thousand it necessarily came from the proceeds of the United States bonds:

"All these things happened five or six years before the culmination of the scheme to unload the responsibility for this fund onto the shoulders of the plaintiff Frank H. Shields. In the meantime the Boone County bonds had disappeared, and their place had been taken by the eighteen hundred dollars of Johnson County township bonds, upon which no interest had been paid for years and the principal of which had long been due and defaulted, and twenty-one hundred of worthless residuum of defunct St. Louis bank stock, which represented not an asset, but a total loss. That either of these ever bore fruit of any kind does not appear in the record. In addition to these was cash, twenty-eight hundred and ten dollars, and whatever, if anything, constituted a valid charge on his mother's home as proceeds of this six thousand dollars. We have seen that two thousand dollars of this must necessarily have come from the proceeds of the bonds if she received anything in that transaction. The amount at which the home stood in the Frank H. Shields receipt was \$3290. Subtracting from this the \$2000 leaves \$1290 as the amount some part of which might possibly have arisen from some other source than the Government bonds. Adding this to the amount of cash paid him to balance the account and we have \$4100, or one hundred dollars more than the amount of the principal of the Government bonds which constituted that part of the original trust fund immune from any charge against the purchase money arising out of the More sale.

"We do not think there is anything in these facts that charges plaintiffs or either of them with notice of having received any of that part of the purchase price of the More land retained in the trust fund, in the distribution of their mother's estate, and so hold. If, however, the respondents desire an accounting in that respect they may, under the offer contained in the replication, have such accounting in this suit, without

the presence of additional parties, to be taken in accordance with the principles stated in this opinion, the amount, if any, so ascertained to have been received by appellants through the distribution of the estate of Lucy B. Shields or otherwise to be apportioned upon the land sold to More and the proportional amount properly chargeable to the land in controversy charged thereon.

"Although Mrs. Cunningham had constructive notice of the title of plaintiffs from the recitals of the deed through which she claims, we are satisfied that her possession of the land was in good faith under an honest belief that she was the owner in fee by virtue of the provisions of the same deed, and that she is entitled to relief to the extent that the value of the land is enhanced by permanent improvements made by her and her predecessors under the More title before actual notice of plaintiffs' claim. For the reasons we have stated in this opinion the judgment of the circuit court for Boone County should be reversed, and the cause remanded for further proceedings in accordance with the views therein expressed."

For the foregoing reasons I dissent from the majority opinion in this case. *Blair and Williams, JJ.*, concur in these views.

THE STATE ex rel. HENRY E. PERKINS et al. v.
HENRY B. LONG et al.

In Banc, June 28, 1918.

1. **APPEAL:** By Relators in Quo Warranto. The individuals at whose request a proceeding in the nature of *quo warranto* has been instituted by the prosecuting attorney to determine the right of respondents to exercise the powers of school directors have the right to prosecute an appeal after said proceeding has been dismissed.

2. ———: **Affidavit: Made By Agent.** An affidavit for an appeal, made by appellants' attorney as their agent and containing the required statutory allegations, is sufficient.
3. **PLEADING: Liberally Construed.** The common-law rule that pleadings must be strictly construed against the pleader has, by statute, been either modified or abrogated in favor of liberal construction. Even upon demurrer it is permissible to infer all facts from those expressly stated that may be implied by fair and reasonable intendment.
4. ———: **Consolidated School District: Answer: Exact Date of Filing of Petition.** Where the information in a *quo warranto* contains only the general charge that the proceedings "were irregular, contrary to the requirements of the law and void," an averment in the answer that a petition for the establishment of the consolidated school district was filed with the county superintendent in January, 1916, is sufficiently exact upon demurrer, even in view of the rule that the answer of respondents must contain definite denials of the allegations of the information and affirmative declarations of their rights. The material averment of the filing have been made, objection to the failure to allege the exact date should be made by a motion to make more definite and certain.
5. ———: ———: ———: **Meeting of Voters.** Where the answer avers that ten notices of the time, place and purpose of a meeting of the voters of the proposed consolidated school district and five plats of its boundaries were posted for fifteen days in public places; and that in pursuance to them a meeting of the voters was held at two o'clock in the afternoon of a certain date thereafter, and the information in no wise challenges the fact of the giving of notices, the presumption obtains that the notices specified the exact time when the meeting was to be held and that the meeting was commenced and held at that time in conformity with the statute.
6. ———: ———: ———: ———: **Called to Order By Superintendent.** All other requisites to the holding of a valid meeting of the voters to determine the question of the formation of a consolidated school district having been complied with, the absence from respondents' answer, in the *quo warranto* proceeding, of an averment that such meeting was called to order by the county superintendent, will not invalidate the district or authorize a demurrer to the answer. That statutory requirement is directory.
7. ———: ———: ———: **Two Hundred Children.** If the answer of respondents contains an averment that the consolidated school district has an area of twelve square miles, it is not defective because it contains no averment that there were two hundred children of school age within its boundaries. The jurisdictional requirement of the statute is in the alternative.

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burnes*, Judge.

AFFIRMED.

Henry E. Perkins, F. B. Ellis, E. C. Hall for appellants.

(1) The demurrer and motion for judgment on the return should have been sustained. The court erred in overruling them, because: (a) The return fails to show that a proper petition was presented. Laws 1913, p. 722. (b) The return fails to show that a meeting was held in the proposed district, or where it was held. (c) The return fails to show that a meeting was held pursuant to such notices. *State v. Potter*, 191 S. W. 57. (b) The return fails to show that such meeting or any meeting was called to order under the supervision of the county school superintendent. Laws 1913, p. 722. (e) The return fails to show that a meeting was organized and conducted in accord with Sec. 10865, R. S. 1909. (f) The return fails to show who, if anyone was chosen as chairman, or who was secretary. (g) The return fails to show that the petition was filed with the county superintendent of the county in which a majority of the petitioners resided. Laws 1913, p. 723. (h) The return fails to show that such district contained two hundred children of school age. (i) The return fails to show what territory, with the boundaries thereof, if any, was comprised in such proposed district. (j) The return fails to show what specific proposition was submitted to the voters at the special meeting, or what territory was included therein. (2) The creative power by which such consolidated school districts are enabled to override the will and wishes of a vastly more numerous community, composed of the surrounding school districts, whose territory is being taken, without giving them a voice in the proceedings, is principally comprised in the vote taken at the special meeting. If it votes no, there can be no

organization; if it votes yes, and antecedent proceedings have been regular, the vote will give life and being to the new corporation. But to have such effect the acts must be certain, reasonably complying with the law granting the power, and designating with certainty well defined boundaries for the operation of such corporation. And unless the proposition voted on specifies the boundaries of the district sought to be formed the vote will not have the effect to create the corporation. *School Dist. v. School Dist.*, 94 Mo. 618; *Mason v. Kennedy*, 89 Mo. 22. (3) Laws 1913, p. 722, require proceedings of the special meeting to be in accordance with Sec. 10865, R. S. 1909, which requires the chairman and secretary to keep a record of the proceedings. (4) Said Act of 1913, page 722, expressly requires the superintendent of schools to call the special meeting to order. This statute is mandatory. 36 Cyc. 1158-1159; *Hope v. Flentge*, 140 Mo. 402; *State ex rel. v. Tucker*, 32 Mo. App. 627; *State ex rel. v. School Dist. 3*, 163 Mo. App. 253; *State ex rel. v. Denny*, 94 Mo. App. 559. (5) The rule is that the burden is on respondents to show title to the office claimed, by both pleading and proof. *State ex rel. Harris v. McCann*, 88 Mo. 386; *State ex rel. v. Giovannoni*, 59 Mo. App. 43; *Mechem Pub. Officers*, secs. 490-491; *State ex rel. Ewing v. Francis*, 88 Mo. 561; *State ex rel. Mo. Pac. Ry.*, 206 Mo. 40; *State v. Powles*, 136 Mo. 376.

R. H. Musser, Pross T. Cross, R. E. Culver, for respondents.

(1). The demurrer has the effect to admit all facts alleged; so that it is shown: "That none of the complainants are resident tax-payers of the consolidated school district; that the district of which respondents are directors was organized under Laws 1913, pp. 721 to 725; that a petition of twenty-five or more residents of the Grayson community petitioned the organization; that thereafter the county superintendent visited the

community, investigated the needs and determined the boundaries of a proposed district, called a meeting, gave the notices, made the plats, posted plats, filed copies of plat, petitions, etc., with county clerks and superintendents; that meeting was held; that plat was there; that a vote was had; that fifty-two voted "for organization" and twenty-five "against organization;" that district was declared organized; that respondents were thereafter elected directors and these proceedings certified as required by laws to the county clerks and superintendents of Clinton and Buchanan County; that the district contained more than twelve square miles of territory," all of which appears to be all that the law requires. Laws 1913, pp. 721 to 725; State ex inf. v. Gordon, 261 Mo. 631; State ex inf. v. Morgan, 268 Mo. 266; State ex inf. v. Cloud, 192 Mo. App. 322; State ex inf. v. Jones, 266 Mo. 191; State ex inf. v. Clardy, 267 Mo. 371; State ex inf. v. Gleaves, 268 Mo. 100; State ex inf. v. Wright, 270 Mo. 376; State ex inf. v. Smith, 271 Mo. 168; State ex inf. v. Stouffer, 197 S. W. 79; State ex inf. v. Moss, 187 Mo. 155; State ex inf. v. Berkley, 140 Mo. 184; State ex inf. v. Francis, 88 Mo. 557; State ex rel. v. Sims, 201 S. W. 910. (2) The court is without jurisdiction to determine this appeal. (a) Sec. 2631, R. S. 1909, allows the prosecution of the information to final judgment by the relators or their attorney, so that when the information is filed, the prosecuting attorney is without right to dismiss or discontinue the case, without the consent of the complainants. In this case, final judgment was entered. Sec. 2090, R. S. 1909; 2 Ency. Plead. & Prac. 53; 23 Cyc. 1232; 13 Am. & Eng. Ency. Law (2 Ed.) 24. (b) The affidavit for an appeal was made by the attorney of the complainants, and upon its face shows that it is not made by anyone with authority to make it; appeals are purely of statutory origin, and the right of appeal must exist in the person or the agent so applying or no jurisdiction is conveyed. *Quo Warranto* is a proceeding solely for the purpose of ascertaining by what right or title respondents or

others coming within its provisions, are exercising rights, franchises and privileges which the State in its sovereign power can grant, and the State only is the aggrieved party, and the State only by its properly selected or elected representatives can take appeals. In this case, the prosecuting attorney was satisfied with the facts pleaded in the return and when it was adjudged sufficient by the court did not longer take part in the case. Judgment was entered, and from that judgment the State by no authorized person has taken an appeal. State ex inf. v. Duncan, 265 Mo. 34. The prosecuting attorney is by law the representative of the State within the county that elects him, and he prosecutes for and on behalf of the State all civil and criminal matters of the State, but private rights or injuries have nought to do with the public wrongs, and the public can only be represented through the official of the State who performs every act, made necessary by law, to be done on behalf of the State. The wrongful usurpation of a public office is a public wrong and only the State can be the plaintiff and the party aggrieved by such action. The State undertakes the prosecution not to punish the private injury, but the wrong done, the public and society is solely the object of the State solicitude. Sec. 2038-2040, R. S. 1909; State ex inf. v. Taylor, 208 Mo. 442; State ex inf. v. Standard Oil Co., 218 Mo. 345; State ex inf. v. McMillan, 108 Mo. 157; State ex inf. v. Rose, 84 Mo. 198; Hessig v. Atty. General, 104 Ills. 292; State v. Railroad, 242 Mo. 275; State ex inf. v. Railroad, 176 Mo. 687; Churchill v. Walker, 68 Ga. 681; 17 Ency. Plead. & Prac., 456-488. The relators are not parties to the information and have no rights of their own authority to make any application to the court. Atty. General v. Wright, 43 Eng. Chancery, 447; Commonwealth v. Burrell, 7 Pa. St. 34. The relators have no vested rights in the statute laws of the State and were without any further right of appeal after judgment without the consent of the prosecuting attorney.

WALKER, J.—This is a proceeding by information in the nature of *quo warranto*, to determine the right of respondents to exercise the duties of school directors. A return was filed by respondents to the information, to which the appellants demurred. This demurrer was overruled. Appellants refused to plead further, and on motion for judgment on the pleadings by the respondents, appellants' bill was dismissed, from which judgment an appeal was perfected to the Kansas City Court of Appeals. On motion of respondents, the case was transferred to this court for final determination, on the ground that a constitutional question, to-wit, "title to an office under the State was involved."

The question to be determined is the sufficiency of the answer. A better understanding of same may be had by setting forth first the material allegations of the information, which, omitting formal matters as to the official character of the prosecuting attorney at whose relation the action is brought, and that he sues at the request of the individual relators (appellants here) named, avers that "the individual relators are taxpaying citizens and voters of School Districts No. 48 and No. 51 and that said school districts are legally constituted school districts in the county of Clinton, with proper and legally elected and qualified directors, exercising lawful jurisdiction over and being interested in the territory attempted to be included into and forming a part of the proposed consolidated school district for which the respondents herein claim to be directors by virtue of an attempted organization under and by virtue of Session Laws of 1913 of Missouri at page 721. That the proceedings for the organization of such proposed district named and called 'Consolidated School District No. 1 of Clinton County, Missouri,' were and are irregular, contrary to the requirement of the law and void; that Anna L. Sims, County Superintendent of Schools, was without jurisdiction or authority to call the special meeting of voters to vote upon the acceptance or rejection of the proposed

organization of Consolidated School District No. 1 held on February 25, 1916, at the village of Grayson in the school house of District No. 49; that such meeting was not convened and organized as required by law; that the plat of such proposed consolidated district was not made after a visit to such community by said county superintendent to determine the exact boundaries thereof and said boundary lines were not located according to her own judgment as to form the best possible consolidated district and were not made with due regard to the welfare of adjoining districts; but, on the contrary, the same were established by interested parties, in fact, making the plat thereof and improperly influencing said superintendent to adopt the same, although it would cause injury to adjoining districts; that the said special meeting was not properly organized by being opened by the said county superintendent or some one deputized by her and the plat of the proposed consolidated district and was not sent or taken to and exhibited at said meeting for the use of voters; that said proposed consolidated school district did not contain within its boundary lines two hundred children of school age. That the defendants or respondents herein, to-wit, Henry B. Long, Paul M. Culver, John G. Jones, Henry F. Bland, Shelby Elliott and A. E. Smiley, ever since the 25th day of February, 1916, have claimed and do now claim that they were at said meeting elected directors for said proposed consolidated school district and have been and do now unlawfully usurp the office of school directors, and have used and now still use and exercise, without legal authority, warrant, power or right whatsoever, the office of directors and authority over territory including portions of said School Districts No. 48 and No. 51, and for and during said time have claimed and still claim, without legal warrant, grant or right whatsoever, the office of school directors over territory belonging to said Districts No. 48 and No. 51, and do have, use and enjoy all the rights, liberties, privileges and franchises of the said pretended office of school di-

rectors of said proposed Consolidated School District No. 1, without authority of law and contrary to the statutes in such cases made and provided."

This is followed by the usual prayer for relief authorized in preceedings of this character.

The respondents, for their answer and return say:

"That they are the duly elected and qualified directors of Consolidated School District No. 1 of Clinton County, Missouri. That the said W. A. Hord, W. L. Scearce, Newt. Hiatt, E. H. Marshall and J. L. Pulliam are not taxpaying resident voters of the said Consolidated School District No. 1, nor have School Districts No. 48 and No. 51 any territory over which such school districts are exercising jurisdiction, that Consolidated School District No. 1 is exercising jurisdiction over. Respondents say that Consolidated School District No. 1 was duly organized under and by virtue of Session Laws 1913, at page 721; that on the ——— day of January, 1916, there was filed with Anna L. Sims, County Superintendent of Schools, a petition of more than twenty-five citizens of the community near Grayson, Mo., and thereafter said county superintendent visited the community and investigated the needs of the community and determined the boundaries for a proposed consolidated district, so locating the boundary lines as in her judgment formed the best possible consolidated district, having due regard also to the welfare of the adjoining districts, and then called a special meeting of all the qualified voters of the proposed consolidated district for considering the question of such proposed consolidation, making the said call by posting within the proposed district ten notices in public places stating the time, place and purpose of such meeting, at least fifteen days before the meeting was called at 2 p. m. of February 25, 1916. That at the time of posting said notices said county superintendent also posted with said proposed consolidated district at least fifteen days prior to the date of the special meeting five plats, and notices were posted

within thirty days after the filing of the petition aforesaid, and said county superintendent filed a copy of the petition and plats with each the county clerks of Clinton and Buchanan County, Missouri, and sent one plat to the said special meeting. A certified copy of the proceedings of the said meeting is hereto attached and made part hereof. That at the meeting aforesaid the proposition for the organization of consolidated school district received fifty-two votes and against the organization received twenty-five votes, whereupon said Consolidated School District No. 1 of Clinton county, Missouri, was duly declared created and existing, and that the proceedings of said meeting were properly certified by the chairman and secretary of said meeting to the county superintendent of schools and county clerks of each Buchanan and Clinton County on July 25, 1916.

"That thereafter at the said meeting these respondents were duly elected directors of the said school district as follows: Henry B. Long and Paul M. Culver for three years; John G. Jones and Henry T. Bland for a term of two years, and Shelby Elliot and A. E. Smiley for a term of one year, the last named by reason of expiration of their term on April 4, 1916, were re-elected at the school election on said date, for a term of three years, and are duly qualified and acting as such.

"Respondents say that they deny all the allegations in the information and complaint herein not specifically admitted by them, and deny that there was any act or thing done by any person or persons which in any wise makes void the organization of Consolidated School District No. 1 of Clinton County, Missouri, and allege the fact to be that all proceedings had therein were in compliance with the law and were publicly done and that the complainants had full knowledge and information of all matters and things at the time they were done, and were present at the special meeting and at a special election called and held on the ——— day of ——— 1916, and at the regular annual election of said school district, all duly qualified

voters resident of the said consolidated school district voted and participated therein and that all acts and things done with respect to the organization of said school district, and all elections thereafter and the elections of officers, have all been done as required by law, and respondents deny that the complainants or anyone for them have a lawful right to make further inquiry thereunto.

"That said consolidated school district is a district of more than twelve square miles of territory, and that its territorial limits include what was prior to its organization territory of other school districts and of Districts 48 and 51, as said districts were bounded prior to said organization, and over which territory (the territorial limits of Consolidated School District No. 1) said district, by its board of directors, these respondents, now have and are exercising sole and exclusive control, all of which is being lawfully and rightfully done.

"Wherefore the respondents pray the judgment of the court dismissing the complaint and information and denying the issuance of the State writ of *quo warranto* and that they be discharged and go hence without day and the costs hereof be taxed against the complainants or informers therein."

To this return relators filed the following demurrer:

"First; Because said return is insufficient.

"Second: Because said return fails to state facts sufficient to show the creation of the consolidated school district for which respondents claim to be acting directors.

"Third: Because said return shows on its face a failure to comply with the provisions of the Acts of 1913, page 721, under which respondents claim."

Upon the overruling of this demurrer, appellants filed a motion for judgment of ouster upon the pleadings against all of the respondents. This motion was overruled, and appellants refusing to plead further, but standing on their demurrer and motion for judgment, the court ordered that their bill be dismissed,

and that the writ of *quo warranto* which had been issued therein, be quashed, and that respondents have judgment for their costs, etc.

Appellants urge, in support of their demurrer, that the answer and return fails to state:

1. The exact date on which the petition was filed.
2. Or that a meeting was held pursuant to such notices.
3. Or that the meeting was commenced at 2 o'clock p. m. on the date set.
4. Or that the meeting was called to order by the county superintendent of schools or some one deputized by her to call the same to order.
5. Or that the meeting was organized and a record of proceedings kept (except inferentially by saying the proceedings were certified).
6. Or that there were 200 children of school age in the boundaries established.
7. Or that a majority of the petitioners were residents of Clinton County and all qualified voters.

I. It is contended that the appellants had no right to prosecute an appeal of this case after the overruling of their demurrer. This proceeding was brought under Section 2631, Revised Statutes 1909. The prosecuting attorney, under this section, is clothed with the power to determine the propriety of bringing an action of this character, but after he has exercised his discretion and the suit has been brought, he is not permitted to dismiss or discontinue it without the consent of the individual at whose request it was brought. In short, where the action was instituted not *ex officio* but upon request, the individual is the real party in interest and the prosecuting attorney (State ex inf. v. Taylor, 208 Mo. l. c. 452) an instrumentality. The statute, otherwise construed, would present the anomaly of authorizing the assertion in the courts of a right, and while forbidding the official in whose name it was required to be brought to dismiss or discontinue same, upon his failure or refusal to

State ex rel. v. Long.

prosecute it to a final determination, to preclude the real party in interest from so doing. Such a ruling would nullify the statute and limit its effective application to such cases only as are brought by an officer on his own initiative. A reasonable construction of the statute, and one which accords with justice and right, is that where a prosecuting attorney institutes an action of this character upon request, and the court in its discretion permits the same to be brought (*State ex inf. v. McClain*, 187 Mo. l. c. 412; *State ex rel. v. Rose*, 84 Mo. l. c. 202), regardless of the attitude thereafter of the prosecuting attorney, the real party in interest may prosecute it to a final determination. This is in accord with that well established rule, consistent with reason, that a statute should be so construed as to render it operative.

The objection made to the form of the affidavit for appeal is frivolous. The affidavit is made by appellants' attorney as their agent, and contains the required statutory allegations (*State ex rel. v. Broaddus*, 210 Mo. 14, 16.). There is, therefore, no merit in this contention.

II. Preliminary to a consideration of the issue involved, it is not inappropriate to advert to the fact that the common-law rule that pleadings must be most strongly construed against the pleader has, by the codes, been either modified or abrogated in favor of liberal construction. Our own statute (Sec. 1831, R. S. 1909) provides in this regard that: "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties." This statute has received frequent judicial application. [*Thompson v. Livery Co.*, 214 Mo. 487; *Lee v. Railway*, 195 Mo. 400; *Ackerman v. Green*, 195 Mo. 124; *Sidway v. Mo. Land etc. Co.*, 163 Mo. 342; *Baird v. Cit. Ry. Co.*, 146 Mo. 265; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Overton v. Overton*, 131 Mo. 559.] Even on demurrer, it is held

permissible to infer all facts from those expressly stated, that may be implied by fair and reasonable intendment. [Hood v. Nicholson, 137 Mo. 400; Embree v. Patrick, 72 Mo. 173.]

The general rules thus announced may serve as hallmarks to guide us in determining the sufficiency of the pleading under review. The purpose of the statute authorizing the establishment of consolidated school districts is to give children opportunities for more extended education than is now afforded by the common schools. Under this statute, the people in the rural districts are enabled to establish and maintain high schools, heretofore confined to our cities and towns. The increased opportunities these districts afford will tend to stimulate a desire for higher education, which will ultimately result in an increase in the enrollment of students at our State University and Normal Schools.

Keeping the purpose of the law in view, therefore, and the results that may reasonably be expected to follow proceedings thereunder, we are authorized, without violating any canon of construction, to liberally construe the pleading under review.

III. It is contended that the exact date of the filing of the petition with the County Superintendent of Schools for the establishment of the consolidated district, should have been stated in the answer.

**Exact
Date.**

Not only does such filing affirmatively appear, but it is stated to have been made in January, 1916. Looking to the information filed by the appellants, and to which this answer is intended to respond, we find no specific allegation as to a lack of the filing of the petition for the establishment of consolidated district with the county school superintendent. The information contains only a general averment of unauthorized action by the county superintendent. This is, at best, but a conclusion. Proceeding on the assumption, however, no demurrer having been filed to the information, that the answer herein shall contain definite denials of the allegations of the information

and affirmative declarations of the rights of the respondents (State ex inf. v. Clardy, 267 Mo. l. c. 381), we find that the averment of such filing having been made, the requirements of the law are sufficiently complied with. The material fact appearing to have been pleaded, the objections to the failure to allege the exact date should have been submitted by a motion to make more definite and certain, instead of a demurrer.

The contention that a meeting of the voters of the proposed consolidated district was not held in pursuance of the requirement of the statute, is met by

the presence in the answer of an averment
Meeting that such meeting was so held. The notice
of Voters.

of the time, place, and the purpose of such meeting is likewise stated to have been given by the posting of such notices. No specific allegation appearing in the petition challenging the fact of the giving of such notices, the presumption obtains not only that they conformed to the requirements of the statute in specifying the exact time when the meeting was to be held, but that it was commenced and held as therein stated. All the other requisites to the holding of a valid meeting to determine the question of the formation of the district having been complied with, the absence from the pleading of an affirmative statement that such meeting was not called to order by the County Superintendent of Schools will not be held to invalidate the formation of the district. Such requirement is in no sense jurisdictional, and the failure of the superintendent to comply with same can work no prejudice to those whose interests are to be affected. We, therefore, hold this requirement of the statute, under the facts in this case, to be directory.

The averment that the proceedings of the meeting were certified to by the chairman and secretary to the County Superintendent of Schools and county clerks of Buchanan and Clinton counties constitutes a sufficient statement as to the organization of the meeting, and that a record of the proceedings was kept. There could, in the very nature of things, have been no formal

certification such as is alleged to have been made, and as is required by law, unless there was something to certify.

It is urged that there is no averment that there were two hundred children of school age in the boundaries of the district sought to be established. This, as we held in *State ex inf. Simrall v. Clardy*,
Area and Children. supra, is a jurisdictional requirement in the organization of the district (*Laws 1913, p. 722, Sec. 3*). If it was unqualified or stood alone, the absence of its averment from the pleading would render the latter insufficient, and hence subject to demurrer. We find, however, that the requirement is in the alternative; the statute being that the district to be organized shall have an area of twelve square miles, or an enumeration of at least two hundred children of school age. The averment as to area in regard to the proposed district is definitely made, and hence the contention must fail.

It sufficiently appears that the petitioners were not only residents of the counties, but of the original districts out of which the consolidated district was formed, and the contention in regard to the lack of definiteness in regard to this averment must, therefore, be overruled.

The substantial requirements of the law having been complied with in the answer, the overruling by the trial court of the appellants' demurrer thereto was authorized, from which it follows that the judgment should be affirmed. It is so ordered. All concur.

LEVI T. BURTON, Administrator of Estate of MAY
BURTON, Appellant, v. CHICAGO & ALTON
RAILROAD COMPANY.

Division One, July 5, 1918.

1. **APPELLATE PRACTICE: Motion to Quash Execution and Retax Costs: Treated as One.** Defendant filed its motion to tax costs, and that being overruled filed its motion to recall, quash and set aside an execution theretofore issued on a judgment in favor of plaintiff, and in said motion and as one ground thereof set forth in full the prior motion to tax costs, which motion was sustained as to the matter of retaxing costs, but the judgment ignored the other grounds set up in the motion for quashing the execution. Thereupon plaintiff filed his motion to set aside the "judgment upon the motion to retax costs," which being overruled he appealed. *Held*, that, as the motion to quash the execution and to retax the costs were treated as one motion at the hearing, and as the bill of exceptions covers the proceedings had at said hearing, plaintiff's appeal from the order retaxing the costs is maintainable, and the court's action is for review. Appellant is not to be denied a review because he followed in the footprints made for him by respondent.
2. **COSTS: In Action for Damages.** Even though the petition in an action for damages contains two counts and the court gives a peremptory instruction to find for defendant on the first count, if the verdict and judgment are for plaintiff on the second count, it is the duty of the clerk to tax all the costs against defendant, for the statute (Sec. 2268, R. S. 1909) says that "in all actions not founded on contract, if the plaintiff recover any damages he shall recover his costs." The costs being so taxed, a motion to retax them implies a subsequent judicial investigation and determination by the court.
3. ———: **Retaxed at Subsequent Term.** The clerk having upon the return of a verdict for damages for plaintiff upon one count of his petition in an action *ex delicto*, entered a judgment in which he taxed all the costs against defendant, as the statute required, a motion to retax costs filed by defendant at a subsequent term was too late, and the court had no jurisdiction to entertain it. The motion to retax must be filed at the term at which the judgment was entered.

Appeal from Randolph Circuit Court.—*Hon. Alex. H. Waller, Judge.*

REVERSED.

Aubrey R. Hammett for appellant.

(1) The costs were adjudged against defendant by the judgment of the trial court. Defendant could only complain of this by motion filed within four days after rendition of judgment. It could not raise point by motion at term subsequent to that at which judgment was entered. *State v. O'Briant*, 176 Mo. 443; *Ashby v. Glasgow*, 7 Mo. 320; *Silex Savings Bank v. Ellis*, 162 Mo. App. 395; *Ramsey v. Rothwell*, 168 Mo. App. 271; *Mann v. Warner*, 22 Mo. App. 577; *Bosley v. Parle*, 35 Mo. App. 232; *Paul v. Minn. Threshing Co.*, 87 Mo. App. 647. (2) This is an action *ex delicto* and therefore Sec. 2268, R. S. 1909, controls, and if plaintiff recover any damages he shall recover his costs. *Ozias v. Haley*, 141 Mo. App. 637. (3) Under the testimony part of the witnesses were subpoenaed by plaintiff to testify on the first count and some of them actually did testify thereupon.

W. P. Pinkerton and Scarritt, Scarritt, Jones & Miller for respondent.

(1) The plaintiff appeals to this court from an order of the court below retaxing costs on the 23rd of December, 1914. His record contains no bill of exceptions covering this alleged order, but does contain a bill of exceptions covering the proceedings had and exceptions taken at the hearing on defendant's motion to quash and recall execution, but as plaintiff is not appealing from the court's order sustaining defendant's motion to quash the execution, there is nothing before this court for review. *State ex rel. McKinney v. Pulliam*, 104 Mo. App. 94; *Graff v. Dougherty*, 139 Mo. App. 56; *Corby v. Tracy*, 62 Mo. 515; *Saddlery Co. v. Bullock*, 86 Mo. App. 92; *Boothe v. City of Fulton*, 85 Mo. App. 16; *Wainwright v. Missouri L. & M. Co.*, 161 Mo. App. 374; *Bohn v. Lucks*, 165 Mo. App. 701. (2) The court's order taxing certain costs in this case was

Burton v. Railroad.

proper and valid. Sec. 2285, R. S. 1909; Sec. 2263, R. S. 1909; Buckman v. Ry. Co., 121 Mo. App. 304; Dulle v. Deimler, 28 Mo. 583; State v. Vogel, 14 Mo. App. 187; Cauthorn v. Berry, 69 Mo. App. 410; Turner v. Butler, 66 Mo. App. 380; Coart v. Hill, 33 Mo. App. 116; Mann v. Warner, 22 Mo. App. 577; Bosley v. Parle, 35 Mo. App. 232; State v. Railroad, 78 Mo. 575; Dawson v. Waldheim, 89 Mo. App. 250; Witten v. Robison, 31 Mo. App. 525.

WOODSON, J.—This is an appeal from an order and judgment of the circuit court of Randolph County setting aside and quashing an execution issued on a judgment rendered in the case of Levi T. Burton, Administrator of the Estate of Mary Burton, deceased, against the defendant, and retaxing the cost therein. The appeal was taken to the Kansas City Court of Appeals, and by that court the cause was transferred to this court because a constitutional question was involved.

The facts are practically undisputed, and are substantially as follows, as shown by the appellant's statement of the case and abstract of the record filed in this court, viz:

"Plaintiff's decedent was killed upon a railroad crossing by one of defendant's trains. Plaintiff brought suit in two counts. At close of all the evidence the court gave a peremptory instruction for defendants on the first count of the petition. The second count was under the humanitarian law, and plaintiff recovered three thousand dollars verdict thereupon. Defendant appealed to the Kansas City Court of Appeals. While the appeal was pending the Supreme Court of Missouri handed down the opinion in the Boyd case, 249 Mo. 110, holding that only the penal sum of two thousand dollars could be recovered for the death of an unmarried adult when there was no proof of pecuniary loss on the part of plaintiffs. Following this opinion the Kansas City Court of Appeals rendered such judgment as should have been rendered upon the whole record

in the case and affirmed the judgment of the lower court in the sum of two thousand dollars. Mandate issued to the clerk of the circuit court whence the appeal was taken, and by the said circuit clerk spread upon the records of that court. Execution issued from said circuit court against the defendant for two thousand dollars and interest thereon from date of judgment in the said circuit court and all the costs incurred in the lower court. Defendant filed motion to retax certain costs that was claimed by it to be made in the defense of the first count upon which the court gave a peremptory instruction for defendant. The court overruled this motion and later on during the same term, December 23, 1914, set aside its said order and sustained said motion in part, retaxing \$129.50 of the cost and taxing it against plaintiff. From this order plaintiff appealed to this court."

The defendant's motion to quash and recall the execution was in words and figures as follows:

"Comes now the defendant and moves the court to recall, quash and set aside the execution heretofore issued in this cause on behalf of plaintiff against defendant, for the following reasons, to-wit:

"1. Because there is no judgment herein in this cause on which to predicate or base the execution.

"2. Because the judgment of \$3000 entered against defendant at the February term, 1912, of this court has been duly appealed from and lodged in the Kansas City Court of Appeals, and bond was duly given as required by order of the court and operated as a *supersedeas* bond and no execution can lawfully be issued, predicated or based upon said judgment. Said judgment has never been affirmed, set aside or reversed by the Kansas City Court of Appeals or this court, and no judgment has been entered in this cause setting aside, affirming or reversing this judgment, and the case having been duly appealed and *supersedeas* bond given and approved by this court, no execution can lawfully issue in this cause.

Burton v. Railroad.

"3. Because no lawful judgment has been or can be rendered and entered in this court on the mandate of the Kansas City Court of Appeals, which has been sent to the clerk of this court and filed herein and entered by said clerk in the records of this court, and the Kansas City Court of Appeals had no authority under the law to execute and issue the mandate heretofore referred to, and the same was not within the power or jurisdiction of said court.

"4. Because the clerk of this court had no right, authority or power under the law to enter upon the records of this court said mandate or mandates executed and issued by the Kansas City Court of Appeals.

"5. Because not to recall, quash and set aside execution will be to deprive defendant of its property without due process of law, contrary to Section 30 of Article 2 of the Constitution of Missouri, in this, that it will take from defendant its property without judgment or ruling of the court and under a mandate that the Kansas City Court of Appeals had no right, jurisdiction or authority to execute and issue; and it would also be a denial to defendant of the equal protection of the laws and the taking of its property without due process of law contrary to Section 1 of Article 14 of the Amendments to the Constitution of the United States.

"6. Because said execution was unlawfully issued and is for an excessive sum or amount in any event.

"7. Because the court erred in overruling defendant's motion to tax or re-tax costs in this suit, which order was entered on or about December 8, 1914. Said motion to tax costs is made a part of this motion, and is in words and figures as follows:

"1. Comes now the Chicago & Alton Railroad Company in the above entitled cause and states to the court that at a trial of this cause at the February term, 1912, of the Circuit Court of Randolph County, Missouri, at Moberly, the jury returned a verdict in favor of the defendant, the Chicago & Alton Railroad Company, on the first count of the petition, upon which verdict the court duly entered judgment in favor

of defendant and against plaintiff, which judgment was unappealed from and has become final.

“ ‘2. Defendant further states that for the purpose of defending the allegations made by plaintiff in the first count of his petition it caused to be subpoenaed the following witnesses, who, duly and in obedience to subpoenas legally served, attended the trial of the above cause above set forth, on the first count of the petition as witnessed for defendant, and duly at the time of said trial claimed their witness fees for attendance, as is evidenced by the records of this court: Cliff Taylor, two days, sixty miles, \$5.50; Mrs. Cliff Taylor, two days, sixty miles, \$5.50; C. Maupin, two days, seventy-six miles, \$6.30; J. A. Denny, two days, fifty miles, \$5; R. N. Bagby, two days, fifty miles, \$5; C. H. Woods, two days, sixty miles, \$5.50; H. P. Hawkins, two days, sixty miles, \$5.90; J. F. Becket, two days, eighty miles, \$6.50; C. D. Williams, two days, eighty-eight miles, \$6.90; H. Tillery, two days, eighty-eight miles, \$6.90; E. L. Hackley, two days, eighty-eight miles, \$6.90; L. K. Bailey, two days, eighty-eight miles, \$6.90; E. L. Jones, two days, eighty-eight miles, \$6.90; E. R. Elledge, two days, eighty-eight miles, \$6.90; G. F. Fishbeck, two days, eighty-eight miles, \$6.90; R. W. Compton, two days, eighty-eight miles, \$6.90. Total \$100.40.

“ ‘3. Defendant further states that all of the above named witnesses were witnesses only as to issue made by the first count of plaintiff's petition and none other, and were subpoenaed by defendant solely for the purpose of making a defense on the issues as joined by the first count of plaintiff's petition; that said witnesses duly claimed their witness fees and mileage as required by law, as is evidenced by the records of this court, and plaintiff having been the losing party on the first count of the petition and defendant the winning party, defendant states that the above items of costs should be taxed against plaintiff.

“ ‘4. Defendant further states that the fees of George Gibson, Sheriff, for subpoenaing the above wit-

Burton v. Railroad.

nesses, amounting to \$13.20, should also for the reasons above given be taxed against the plaintiff, and defendant prays the court to so tax said costs.

“ ‘5. Defendant further states that all other costs made by the clerk of the court and other officers, other than those above mentioned, in connection with the first count of the petition, should likewise be taxed against the plaintiff, and defendant prays the court to so tax said costs.

“ ‘6. Defendant further states that the following witnesses for plaintiff claimed witness fees and mileage as follows: L. E. Markland, two days, fifty miles, \$5; Edward Shafer, two days, fifty-eight miles \$5.40; C. E. Biswell, two days, \$2.00. Defendant states that it is its information and belief that said witnesses were not witnesses on any other count of the petition than the first count and that the witness fees of said witnesses should be taxed against the plaintiff, and defendant prays the court so to do, together with the sheriff's fees covering the subpoenaing of said witnesses, as shown by the records of the court.

“ ‘WHEREFORE, defendant prays the court to tax against plaintiff the above items of cost as set forth in the different paragraphs of this motion, or so much of these items of costs as under the law should be taxed against plaintiff, and for such other items of cost not herein specifically mentioned and such other relief and orders as may be proper in the premises.’ ”

The defendant introduced in evidence the bill of costs as taxed by the clerk during the term of the court, at which the judgment for \$3000 was rendered for the plaintiff, the same being set forth in defendant's motion to retax same; it also introduced oral testimony tending to prove the allegations of the motion to the effect that the witnesses named herein were subpoenaed for the sole purpose of proving or disproving the cause of action stated in the first count of the petition.

Under the evidence the court found the facts for the defendant and rendered the following judgment to retax the costs.

"Now at this date the court having seen, heard and considered defendant's motion to retax the costs of this suit incurred, and being now fully advised of and concerning the premises, doth sustain said motion and the amount claimed by the defendant, to-wit, the sum of \$129.50, be and the same is hereby taxed against plaintiff, Levi T. Burton, administrator."

Thereafterwards, during the same term, to-wit, the 23rd day of December, 1914, plaintiff filed his motion asking that said judgment be set aside, and he be given a new hearing, which motion, omitting the caption, was as follows, to-wit:

"Now comes the plaintiff and prays the court to set aside its judgment of December 22nd upon motion to retax costs wherein the costs made on the first count of plaintiff's petition was taxed and adjudged against plaintiff in the sum of \$129.50, for the reasons:

"1st. That the same is against the law.

"2nd. That the same is against and contrary to the evidence.

"3rd. Because the same is contrary to Section 2263, Revised Statutes of Missouri for 1909.

"4th. Because all the costs of this suit were adjudged against defendant by the first judgment in said cause rendered and defendant could not be heard to complain except by motion for new trial filed within four days after the rendition of said judgment.

5th. Because the witnesses whose fees have been taxed against plaintiff were not subpoenaed according to law.

"6th. Because in the hearing on said motion, the court erroneously admitted improper evidence offered by the defendant over the objection of the plaintiff."

This motion was overruled and the plaintiff duly appealed as previously stated.

I. Counsel for defendant presents a preliminary question by which it is contended that the plaintiff is in no position to have this court pass upon
Merits of Case. the merits of the motion; that question is stated in this language:

“The plaintiff appeals to this court from an order of the court below retaxing costs on the 23rd of December, 1914. His record contains no bill of exceptions covering this alleged order, but does contain a bill of exceptions covering the proceedings had and exceptions taken at the hearing on defendant’s motion to quash and recall execution, but as plaintiff is not appealing from the court’s order sustaining defendant’s motion to quash the execution, there is nothing before this court for review.”

This contention is not tenable, for the reason that defendant treats and states that the motion to quash the execution and to retax the costs in the case was treated and considered as one motion, and the plaintiff had the legal right to do likewise. The last clause of the seventh reason assigned by counsel for defendant in their motion to quash and recall the execution reads thus:

“Said motion to tax cost is made a part of this motion and is in words and figures as follows:”

Then follows the motion to retax previously copied.

Counsel for the plaintiff cannot be punished for following in the footsteps of counsel for defendant, which designates the motion to retax cost as a part of the motion to quash the execution.

We, therefore, rule this question against the defendant.

II. Counsel for plaintiff contends that the order and judgment of the circuit court retaxing the cost in the case at a term subsequent to that at which the costs were originally taxed is at least erroneous, if not absolutely void, for the reason that the court had no jurisdiction to make said order regarding this character of costs.

**Taxing and
Retaxing Costs.**

He states his position thus: “Defendant could only complain of this by motion filed within four days after rendition of judgment. It could not raise point by motion at term subsequent to that at which judgment was entered.”

The cause of action out of which this motion arose was an action *ex delicto*, and was governed by Section 2268, Revised Statutes 1909, which reads:

"In all actions not founded on contract the damages claimed in the petition shall determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his costs."

Without attempting to pass upon the correctness of the position taken by counsel for defendant in their motion to quash the execution and retax the cost, yet under the mandate of this statute there can be no question, in the absence of a showing to the contrary, made during the term of the court at which the trial of the cause was had and the final judgment rendered thereon, but what it was the duty of the clerk of the circuit court to tax all the cost against the defendant, just as the record in this case shows he did. In the absence of a showing to the contrary by the record or by evidence *aliunde* the presumption is that the words of the statute that "he shall recover his costs" means all of the costs of the case; but whether that is true as a matter of fact is quite a different question. Counsel for defendant recognized the correctness of this statement of the law by the introduction of oral testimony in support of the allegations of their motion to retax, to the effect that the witnesses mentioned therein were subpoenaed solely for the purposes of proving or disproving the cause of action stated in the first count of the petition. This being true, and the undisputed evidence of the case showing that the clerk did tax these costs during the term of the court at which the judgment was rendered, the law is plain that, even though it might be conceded that the contention of counsel that these costs should have been taxed against the plaintiff is correct, the defendant was not entitled to have the court retax these costs at a subsequent term of the court, because such action on the part of the court necessarily required a hearing of evidence *aliunde* the record, a finding of facts and a

Burton v. Railroad.

judicial determination of the question, as well as the amount of costs that should be retaxed.

After reviewing the authorities upon the subject, Fox, J., in the case of *State ex rel. v. Keokuk & Western Railroad Co.*, 176 Mo. 443, l. c. 450, clearly states the law in this language:

"It will be observed that all the cases treating of applications to tax costs at a term subsequent to the one at which final judgment was rendered, make clear the distinction of taxing costs, which are definite and fixed by law, and costs which require judicial action in determining the amount."

All the authorities agree that the former may be retaxed at any term of the court. Such action is more in the nature of a ministerial duty, and requires no judicial action on the part of the court. Where the costs are definite and fixed by statute, the clerk in the first instance is by law required to tax the costs of the case, which of course is purely a ministerial duty, and when the court is requested to review the clerk's action in that regard, it is exercising a similar duty, simply correcting errors made by the clerk in trying to obey the statutes; but not so in regard to the taxation of costs which requires judicial investigation and determination. In such a case the clerk has no authority whatever to act, except as ordered by the court; in that case the court alone can order the costs taxed or retaxed, which must be done upon judicial investigation and determination, and must be done during the term of the court at which final judgment in the cause is rendered, for it is elementary that with the lapse of the term at which the final judgment is rendered the jurisdiction of the court over the cause ceases.

We are, therefore, of the opinion that the circuit court, at the time it acted, had no jurisdiction to subpoena witnesses, try the facts stated in the motion to retax, or to make the order or render the judgment retaxing the costs complained of in this appeal.

 Rottink v. Nagle.

III. In view of the rulings announced in paragraph two of this opinion, it becomes unnecessary for us to decide the question: would the defendant have been entitled to have the costs retaxed as asked in its motion, had it been timely filed? or to decide the constitutional questions presented by counsel for defendant.

For the reasons stated, the judgment of the circuit court retaxing the costs is reversed. All concur.

CAROLINE ROTTINK v. JOHN H. NAGLE et al.,
Appellants.

Division One, July 5, 1918.

1. **LIMITATIONS: Fraudulent Conveyance: Grantor's Adverse Possession.** Title to land may, by the Statute of Limitations, be re-invested in a fraudulent grantor. A grantor by deed, whether in good faith and a valuable consideration, or to avoid the payment of his debts, may reacquire the fee-simple title to the lands conveyed, by adverse possession thereof for the statutory period of ten years.
2. ———: ———: ———: **Notice of Adverse Claim.** In order to make continuity of possession the basis of an adverse holding by the grantor or his heirs, after the delivery of his deed, he or they must, by words, acts or conduct, apprise the grantee that he is claiming title and possession of the land in defiance of the covenants of his deed; for until such notice is expressly or impliedly given to the grantee he will be entitled to rest secure upon the legal presumption that the continued possession by the grantor is in subservience to the grantee.
3. ———: ———: ———: ———: **Sufficient Evidence.** Testimony that the owner of land, in order to save it from the effect of pending litigation, voluntarily made and recorded a deed to his father-in-law, and thereafter, for sixteen years and up to the time of his death, remained in exclusive possession, making improvements, discharging all existing mortgages, paying all the taxes, and claiming to be the owner, and that after his death his children conveyed the land to his wife and that she thereafter for the two years prior to bringing suit continued in possession, was sufficient to establish the possession of said grantor and his said wife as being adverse, continuous, hostile, notorious and under claim of title for the statutory period of ten years.

Rottink v. Nagle.

Appeal from St. Clair Circuit Court.—*Hon. C. A. Calvird, Judge.*

AFFIRMED.

Geo. A. McIntre and Hargus & Johnson for appellants.

(1) To warrant a decree in this case, the evidence should be of a character so clear, definite and positive as to leave no room or reasonable ground for hesitancy or doubt in the mind of the chancellor. *Ferguson v. Robinson*, 167 S. W. 453; *Smith v. Smith*, 201 Mo. 547; *Reed v. Sperry*, 193 Mo. 173; *Johnson v. Quarles*, 46 Mo. 423. (2) Where a party is in possession of land in privity with the rightful owner there must be an explicit disavowal and disclaimer of holding under that title brought home to the owner, to constitute adverse possession. *McCune v. Goodwillie*, 204 Mo. 338; *Heckescher v. Cooper*, 203 Mo. 278; *Missouri Lumber & Mining Co. v. Jewell*, 200 Mo. 707; *Coberly v. Coberly*, 189 Mo. 17; *Meyer v. Meyer*, 105 Mo. 431; *Budd v. Collins*, 69 Mo. 129; *Hamilton v. Boggess*, 63 Mo. 249; *Wilkerson v. Thompson*, 82 Mo. 330. (3) Where a deed is made to hinder, delay or defraud creditors, grantor's possession is in subordination to the true title, and the Statute of Limitation does not run. *Williams v. Higgins*, 69 Ala. 524; *McClanahan v. Stevenson*, 91 N. W. 925, 118 Iowa, 106; *Hads v. Tiernan*, 25 Pa. Sup. Ct. 14. (4) He who comes into a court of equity must come with clean hands. *Derry v. Fielder*, 216 Mo. 193; *Houtz v. Hellman*, 228 Mo. 655, 128 S. W. 1006; *Seibel v. Heigham*, 216 Mo. 137; *Creamer v. Bivert*, 214 Mo. 473; *McNear v. Williams*, 166 Mo. 358; *Ward v. Hartley*, 178 Mo. 135; *Peddleton v. Asbury*, 104 Mo. App. 723.

Walde P. Johnson for respondent.

(1) The possession of John Rottink, under whom plaintiff claims, was hostile and adverse to defendant. 1 Cyc. 1040; *Brown v. Brown*, 106 Mo. 611; *Lumber Co.*

Rottink v. Nagle.

v. Craig, 248 Mo. 322; Turner v. Hall, 60 Mo. 271; Stone v. Perkins, 217 Mo. 586; Wilkerson v. Eilers, 114 Mo. 254; Scruggs v. Scruggs, 43 Mo. 142.

BOND, C. J.—I. Action to try the title to one hundred and sixty acres of land in St. Clair County, Missouri.

The petitor alleges that on August 16, 1898, and theretofore, one John Rottink, the husband of the plaintiff herein, owned and was in possession of certain land in St. Clair County, Missouri; that on that date he executed a deed conveying said land to John H. Nagle, the defendant, and that said deed is on record in the office of the Recorder of Deeds of St. Clair County; that said deed was made without consideration and was never delivered to said Nagle or accepted by him, but that John Rottink remained in the adverse possession thereof until the date of his death in October, 1914; that John Rottink died intestate, leaving as his only heirs at law Caroline Rottink, plaintiff, and five children; that said children, by proper conveyances, conveyed said land to this plaintiff, who alleged ownership of same in fee and actual, open and notorious possession.

The petition further alleged that defendant John H. Nagle was adjudged to be of unsound mind and incapable of managing his affairs and that defendant James Carter was appointed, qualified and is acting as guardian of his property and estate.

James Carter, as guardian of said Nagle, filed an answer in which he admitted the ownership in 1898 of said land by John Rottink; that since that date the legal title has been in the name of John Nagle; admitted that said Nagle was adjudged of unsound mind; that he was his legally appointed guardian; admitted the death of John Rottink, and denied plaintiff's interest in and title to said land, except in so far as her dower interest therein was concerned.

Ralph P. Johnson, the duly appointed guardian *ad litem*, filed an answer of the same import.

Rottink v. Nagle.

The evidence showed that some years before his death Rottink went to Texas, where he purchased some lands which he traded for the land in suit; that litigation arose as to the Texas land purchased and fearing he might be cast in that suit he deeded the Missouri land, which he got for his Texas land, to John Nagle, his father-in-law; that John Rottink did not borrow money from Nagle at the time he acquired the Missouri farm; that Rottink had the deed to Nagle recorded "to clear him from the Texas land trouble;" that he made improvements on the Missouri land, paid all the taxes thereon up to the time of his death and discharged all the mortgages thereon, and claimed to own the same by full acts of ownership through himself and his real estate agents.

The testimony of James Carter, guardian of John Nagle, showed that he never had anything to do with the land in question; that he had paid no taxes thereon; that he had collected no rents therefrom; that he had made no improvements, and that John Rottink had not acted as his agent or representative in any capacity; and that John Rottink did not say anything to him about owing Nagle money. The guardian of Nagle's estate did not inventory this land, nor discover any indebtedness from Rottink to Nagle. The administrator of Rottink's estate collected the rents of his land after his death.

The trial before the court resulted in a finding and judgment that the title to said land was vested in plaintiff in fee simply by the Statutes of Limitations.

Defendants appealed.

II. The learned trial judge put his judgment in favor of plaintiff on the fact that possession of the lands was held by her husband and his heirs ^{Limitations.} (through whom she claimed) for eighteen years and upon evidence showing that this possession was actual, undisturbed, continuous, exclusive, open and notorious and under a claim of title in the possessors.

That title to lands may be reinvested in a fraudulent, as well as a bona-fide grantor, by the Statute of Limitations, is the settled law in this and other states. In a recent decision (*Robinson v. Reynolds*, 176 S. W. 1. c. 5) the cases are cited and the rule formulated, viz.:

“A grantor by deed, whether in good faith and for a valuable consideration, or to avoid the payment of his debts, may reacquire a fee-simple title to the lands conveyed, by adverse possession thereof for the statutory period of ten years. [*Brown v. Brown*, 106 Mo. 611; *Knight v. Knight*, 178 Ill. 1. c. 558; *Freeman v. Funk*, 85 Kan. 1. c. 477; *Kelly v. Palmer*, 91 Minn. 1. c. 135; *Snyder v. Snover*, 56 N. J. L. 20; *Chatham v. Lonsford*, 149 N. C. 363.]

“The general rule is that, in order to make continuity of possession after the delivery of the deed the basis of an adverse holding, the grantor must by words, acts, or conduct apprise the grantee that he is claiming title and possession of the land against the covenants of his deed; for until such notice is expressly or *impliedly* given to the grantee he will be entitled to rest secure upon the legal presumption that the continued possession of the land by the grantor is in subservience to the grant. [*Meyer v. Hope*, 101 Wis. 123; *Stevens v. Whitcomb*, 16 Vt. 121.] But when the character of such possession is adequately changed the grantee must recognize the altered status, for, if he permits the adverse possession to exist without cessation and without challenge for ten years, the grantor maintaining it may be reinvested with the fee.”

The statement of the above rule is quoted because the case in which it was announced was not officially published. There was no disagreement on the part of the members of this court as to the applicatory law in that case, the only difference of opinion being as to the facts calling for its application, the majority of its judges taking the view that under the evidence the defendant in that case was only in adverse possession from December 23, 1905, until the institution of that suit in 1910, and hence was not in a position to rely

upon the bar of the statute of ten years. In the instant case the possession of plaintiff and her grantors for eighteen years was undenied and the character of that possession as being adverse, continuous, hostile and notorious and under a claim of title to the lands, is not controverted by any evidence in the record, but was abundantly shown on the trial of the case.

In these circumstances it is wholly unnecessary to rule on the other points suggested in the argument. Under the facts disclosed in this record the possession of plaintiff and her grantors and its continuity for the statutory period and the fact that it was hostile and under a claim of title to the land, was established by evidence excluding any reasonable doubt. It is immaterial, therefore, whether the deed from Rottink to Nagle was not only recorded, but actually delivered to Nagle, for on the facts shown in this record an indefeasible title in fee simple was vested by the Statute of Limitations in the heirs of John Rottink.

The judgment of the trial court was correct and will be affirmed. It is so ordered. All of the judges concur except *Woodson, J.*, who dissents.

THE STATE ex rel. CITY OF SEDALIA, Appellant,
v. PUBLIC SERVICE COMMISSION et al.

Division One, July 5, 1918.

1. **FRANCHISE ORDINANCE: Contract.** The passage of an ordinance by the council of a city of the third class and its acceptance by a water company, by which it is provided that the rent on city hydrants shall be a named sum per year, constitute a contract between the city and company, whether or not the ordinance is submitted to a vote of the people.
2. **WATER RATE: In Excess of Ordinance Rate: Power of Public Service Commission.** The Public Service Commission of Missouri has the lawful right to fix the rate for hydrant water, so far as the city is concerned, in excess of the rate fixed by an existing ordinance.

State ex rel. v. Pub. Serv. Comm.

3. **PUBLIC SERVICE ACT: Police Regulation: Legislative Delegation of Power.** The Public Service Act of 1913 and the fixing of reasonable rates to be charged by a public utility company are traceable to the police power of the State, and the Legislature can delegate to the Public Service Commission the power to ascertain and fix reasonable rates for services rendered to the public by divers public service corporations, subject to court review of the question of reasonableness.
4. **POLICE POWER: Abridgment: Nullifying Existing Contracts.** The State of Missouri cannot divest itself of the right to exercise its police power. The Constitution declares that "the exercise of the police power of the State shall never be abridged," and such power cannot be contracted away, nor can the Legislature authorize a municipal corporation to contract it away. A statute which authorizes a city to contract for water service to the city and the general public may be so modified as to delegate to a legislative agent the power to fix rates different from those mentioned in such contract, for the Legislature cannot authorize a municipal corporation and a public service corporation to make a contract which will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

AFFIRMED.

R. S. Robertson for appellant.

(1) Councils of cities of the third class have the power and authority to enter into valid and binding contracts for furnishing the city water for fire hydrants without the necessity of submitting such contracts to the voters. R. S. 1909, sec. 9239. (2) Municipalities of Missouri are not creatures of the Legislature, but are creatures of the Constitution, and therefore the Commission was in error in holding that the Legislature had the right to vest in the Commission the power to either legislate for the city, or to act for the city, in waiving the benefits accruing to the city under a contract entered into by the city prior to the creation of the Public Service Commission. Mo. Constitution, art. 9; *Merchants National Bank of San Diego v. Esconvido Irrigation District*, 77 Pac. 939; *Tacoma Ry. and Power Co. v.*

City of Tacoma, 1917D, P. U. R. 891. (3) If the Legislature had the power and authority as held by the Commission to act for cities in abrogating and cancelling contracts entered into by the city, it has not the power to delegate such authority to some other body or to the Public Service Commission, but must exercise its legislative power vested in it by Section 1 of Article 4 of the Missouri Constitution. *Lammert v. Lidwell*, 62 Mo. 190. (4) The Commission having found that the contract entered into by the City Water Company for furnishing fire hydrants was a valid contract, and it having been entered into, as the Commission held, with the full sanction of the Legislature as clearly expressed in Sec. 9239, R. S. 1909, then, until the Legislature has in some way clearly expressed an intention to either abrogate and take from the city the benefits of that contract, or to vest in some other body the power to abrogate and take from the city the benefits of the contract, it must stand, and in the law creating the Public Service Commission there was no such intention shown by the Legislature, but the contrary intention was clearly shown. Paragraph 5, sec. 69, Public Service Commission Act, Laws 1913, p. 605; *Anderson v. Cortelyou*, 68 Atl. 120. (5) The decision and order of the Commission directly violates the Federal and State Constitutions in that it impairs obligations of contracts and takes from the city its property without due process of law. Mo. Constitution, sec. 15, art. 2; U. S. Constitution, sec. 10, art. 1, and Fourteenth Amendment.

Alex. Z. Patterson and *James D. Lindsay* for respondent.

(1) The city of Sedalia and the water company in the making of the so-called franchise contract, were bound by cognizance of the fact that their dealings were subject to future exercise of the Legislature's power over rates of public utility companies. Hence, the franchise contract was made subject to the Legislature's making use of the State's inherent power, reserved and not exclusively delegated to the city, to supervise all public

service charges. And when the Legislature in its wisdom saw fit to exercise its reserved power of supervision over the matter of public service rates by the creation of a Public Service Commission, and the delegation of rate-making to such Commission, the rates mentioned in the franchise became subject to regulation by such Commission. *Puget Sound T. L. & P. Co. v. Public Service Commission*, 244 U. S. 574; *Milwaukee Elec. Ry. v. Wisconsin Railroad Co.*, 238 U. S. 174; *Worcester v. Street Ry. Co.*, 196 U. S. 539; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79; *Home Tel. Co. v. Los Angeles*, 211 U. S. 265; *Home Tel. & Tel. Co. v. Los Angeles*, 155 Fed. 554 (U. S. C. C. A.); *Portland Ry. L. & P. Co. v. City of Portland*, 210 Fed. 667; *People ex. rel. N. Y. & N. S. T. Co. v. Public Service Commission*, 162 N. Y. Supp. (App. Div.) 405, P. U. R. 1917 B. 957; *People ex rel. Bridge Pp. Co. v. Public Service Commission*, 138 N. Y. Supp. 434, 153 App. Div. 129; *Chicago v. O'Connell*, 278 Ill. 591, P. U. R. 1917 E. 730; *Collingsworth Sewerage Co. v. Borough of Collingsworth* 102 Atl. (N. J.) 901; *Inhabitants Town of Phillipsburg v. Board of Publ. Utilities Com'rs.*, 88 Atl. (N. J.) 1096; *Dawson v. Dawson Tel. Co.*, 137 Ga. 62; *City of Woodburn v. Pub. Serv. Comm.* 161 Pac. (Ore.) 391; *State v. Superior Ct. of King Co.*, 120 Pac. 861, 67 Wash. 37, L. R. A. 1915 C. 287; *City of Pawhuska v. Pawhuska*, 166 Pac. (Okla.) 1058; *Pioneer Tel. & Tel. Co. v. State*, 33 Okla. 724, 127 Pac. 1073; *Duluth St. Ry. Co. v. Railroad Com.*, 152 N. W. (Wis.) 887; *Milwaukee Elect. Ry. & Lt. Co. v. Railroad Com.*, 142 N. W. 491, 153 Wis. 592; *Manitowoc v. Manitowoc & W. Traction Co.*, 145 Wis. 13, 129 N. W. 925; *City of Benwood v. Public Service Comm.*, 83 S. E. (W. Va.) 295, L. R. A. 1915 C. 261; *Turtle Creek v. Pennsylvania Water Co.*, 243 Pa. 415; *Bellevue v. Ohio Valley Water Co.*, 247 Pa. 91; *Yeatman v. Towers*, 126 Md. 513.

GRAVES, J.—Stripped of all useless verbiage this case involves but one question. By ordinance of the city of Sedalia, duly accepted by the predecessor of the

City Water Company of Sedalia, Missouri, it was provided that the rent on city hydrants should be thirty dollars per annum, and certain other water service to the city should be free of charge. This was what is usually called the franchise ordinance. It was never submitted to the vote of the people, but for the question here involved we deem this immaterial. The passage of the ordinance by the City Counsel, and the acceptance thereof by the predecessor of the said City Water Company, constituted a contract between the city and the water company.

From the record here it can be gathered that citizens of the said city complained of the water service, and their complaint was heard by the Public Service Commission, which resulted in the said Public Service Commission requiring the City Water Company to expend something near \$100,000 for appropriate water reservoirs and other improvements. Thereafter the City Water Company applied to the Public Service Commission for increased rates for their service, both to the city and the general public. This required an investigation as to the valuation of the plant and other matters to be considered upon the question of increasing the rates. The relator here was permitted to intervene in these proceedings, which were consolidated as one. The relator planted its right upon the contract provided for in the ordinance, *supra*. Other trivial questions were raised, but to our mind they do not merit notice.

The Public Service Commission heard evidence as to the value of the water plant and other subjects proper to be considered upon the question of water rates. The city was a party throughout these hearings. The result was a general raising of rates, and especially a raising of hydrant rentals (which were to be paid by the city) from \$30 per annum to \$45 per annum. The ordinance aforesaid was in evidence upon this hearing. Not being satisfied with the rates fixed by the Public Service Commission, the city, by statutory *certiorari*, took the matter to the circuit court of Cole County, where the reasonableness of the rates fixed by the Public Service Commission

was approved by that court, and from such judgment of approval and affirmance this appeal has been taken.

Under the facts of the record the reasonableness of the rates fixed by the Public Service Commission cannot be seriously questioned. This leaves the single question as to whether or not the Public Service Commission had the lawful right to fix a rate, so far as the city is concerned, in excess of the ordinance rate. Such is the case when cleared of all driftwood.

I. The question in this case is one in a number of cases, either here or headed this way. The importance of the question bespeaks care and also requires us to take an invoice as to where we are under the Public Service Commission Act. We have adopted the idea of viewing this act in a kindly spirit by giving it a liberal construction. In *State ex inf. v. Kansas City Gas Co.*, 254 Mo. l. c. 535, we said:

“The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at—all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it ‘shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.’ [Sec. 127.]”

See also *State ex rel. v. Public Service Commission*, 259 Mo. l. c. 713.

Not only so, but we have traced the Public Service Commission Act to the police power of the State. In the *Gas Company* case, *supra*, 254 Mo. l. c. 534, in speaking of this law, we said:

“That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly;

that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surety is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust *willy nilly*."

To like effect is State ex rel. v. Public Service Commission, 259 Mo. l. c. 712, whereat it is said:

"The statute involved is new. Referable to the police power, it evidences a departure (or at least an advanced thought) in public policy in dealing with common carriers and public utilities in Missouri. It touches at so many vital points so many vital and open questions; it is such a brave and deserving attempt to provide a speedy and sensible scheme for settling controversies so prevalent, so obstinate, so old, so raw and inflamed between public utility companies and their patrons (to-wit, the public) that wisdom demands its judicial construction proceed with discriminating caution. It is so vast and intricate that it cannot be construed all at once and all doubts dispelled slapdash in a lump as science now kills mosquitoes. The better course is to build up a construction by evolution, step by step, and, to that end, decide nothing except what is precisely necessary to a determination of vital questions raised in each concrete case. Peradventure by that safe and conservative course important phases of the statute will in an orderly way and in due time be digested and so assimilated by sound interpretation that all its remedies will eventually be advanced and all mischiefs within its purview be retarded."

We have further recognized that the Legislature can delegate to the Public Service Commission the power to ascertain and fix reasonable rates for services rendered to the public by the divers public service corporations. [State v. Public Service Commission, 194 S. W. 1. c. 291.] In this case FARIS, J., has aptly said:

"It is also settled beyond doubt or cavil that this power of prescribing maximum rates for common carriers, which, as we have seen, legislatures possess pursuant to an untrammelled grant of the power to pass laws, may be delegated to a railroad commission or to a public service commission. To this rule, unless inhibited by express constitutional provision, there is not a reputable exception."

Other Missouri cases might be cited, but these suffice for the thought now in mind. First, it is made clear by these cases that the ascertaining and establishing of reasonable rates for public service is one falling within the police power of the State. Let us stick a peg here, because this becomes important later. Second, it is likewise made clear that the fixing of reasonable rates may be delegated by the Legislature to the Public Service Commission, subject, of course, to a court review upon the question of reasonableness.

With these two questions made clear and conclusive by our own rulings we will take up later the real question of the instant case. In its discussion there should be kept constantly in mind the two questions, *supra*: (1) that the fixing of reasonable rates for public service is traceable to the police power of the State, and (2) that within proper bounds and limitations the fixing of such reasonable rates can be committed to a body, such as our Public Service Commission.

II. It is claimed by relator that under the last proviso of Section 9239, Revised Statutes 1909, the city was authorized to contract for water service to the city without having such contract submitted to a vote of the people. This we think is true. Such is the statutory

**Abridgement
of Police Power.**

provision. The question really is to what extent such contract is effected by a subsequent law by and through which the Legislature asserts the sovereign power of the State relative to regulating rates for public service.

In reality the question is deeper than suggested above. Going to our Constitution, the real question is, can the Legislature authorize a municipal corporation or a public service corporation to make a contract as to rates which contract will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract? We use both the terms "municipal corporation" and "public service corporation" purposely, because they are usually the opposing parties to the contract. In the instant case the municipal corporation is the party to the contract upon one side, and a public service corporation is the party upon the other side. The two corporations are the two parties which stood at arms-length in the making of the contract here involved. So that we are forced to answer the question, "Can the State of Missouri divest itself of the right to exercise its police power?" This court has held, and we think rightfully so, that the fixing of reasonable rates for service to be rendered to the general public (which general public includes municipal corporations, as well as the citizens thereof) is an exercise of the sovereign police power of the State. Section 5, Article 12, of the Missouri Constitution reads: "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State."

Note the language, "the exercise of the police power of the State shall never be abridged." Under such a constitutional restriction the Legislature would be powerless to enact a valid law by the terms of which the right of the State in the exercise of its sovereign police power in the fixing of reasonable rates for public services could be limited or abridged. This court so held in *Tran-*

barger v. Railroad, 250 Mo. l. c. 55, whereat BONN, J., said:

“(2) All powers of government which regulate the public health, welfare and the property rights of its people—these, no State can strip itself of, for that would render it incapable of carrying out the prime purposes of its creation. The sanctity and import of this attribute of sovereignty are recognized in the Constitution of this State, to-wit: ‘The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State.’ [Art. 12, sec. 5, Constitution of Missouri.] The only restrictions upon the exercise of this faculty are that its use shall be reasonably adapted to the ends for which it is given, and that it shall not infringe any right or privilege guaranteed by the Federal Constitution. The authorities and cases demonstrating these principles are uniform.”

Some of us thought the pronouncement a little broad and dissented, but the case was taken to the United States Supreme Court and there affirmed. [Chicago & Alton Railroad Co. v. Tranbarger, 238 U. S. 67.]

The United States Supreme Court was even more explicit in this Tranbarger case than was the majority opinion in this court. To its rule we must bow. At page 76 of 238 U. S., in this Tranbarger case, it is said:

“It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated or bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. [Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 558, and cases cited.] And it is also settled that the police power embraces regulations designed to promote *the public convenience*

or the general welfare and prosperity as well as those in the interest of the public health, morals or safety. [Lake Shore & Mich. Southern Ry. v. Ohio, 173 U. S. 285, 292; C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S., 561, 592; Bacon v. Walker, 204 U. S. 311, 317.]”

The italics in the above quotation are ours. It was under similar definitions of “Police Power” that this court held that the fixing of reasonable rates for public service is the exercise of the sovereign police power of the State. Such power cannot be contracted away, nor can the Legislature of the State authorize a municipal corporation to contract away this police power of the State. It is clear that the Legislature cannot confer more power upon one of its creatures (a municipal corporation) than it possesses itself. The Legislature is prohibited by the Constitution from abridging the police power of the State, and it cannot legally authorize any creature of the Legislature to abridge this sovereign power. So that we care not what the literal meaning of Section 9239, Revised Statutes 1909, may be. If it be construed so as to abridge or limit the exercise of the sovereign police power of the State, the Legislature overstepped constitutional limitations in enacting it. If it be construed as simply authorizing a contract until such time as the State saw fit to assert its police power, as it did in the Public Service Commission Act, then it would be at least harmless in the instant case.

It is, however, clear that under our Section 5 of Article 12 of the Constitution of 1875 (a section not theretofore found in our Constitution) the Legislature itself cannot abridge the police power of the State. Nor can it authorize a municipal corporation to make a contract abridging or limiting such police power. So that if, as we have held, the fixing of rates for public service is an exercise of the police power, then under other rulings cited above the Public Service Commission had a right to fix reasonable rates irrespective of the alleged contract. The great weight of authority so holds. Cases from a great number of states will be found in the briefs

Wright v. City of Joplin.

for the Public Service Commission. These discuss the question from different angles, but reach the same conclusion. We have preferred to rest the ruling in this case upon what this court has previously ruled, which rulings have been in the light of our own peculiar constitutional provision. Under it the sovereign police power of the State is preserved intact, irrespective of contracts with reference to rates for public service. Under it no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rate. Under the Constitution and the Public Service Commission Act the Public Service Commission (supervised by the courts as to the reasonableness of rates) is exercising the police power of the State by its delegated authority from the Legislature. Its rates therefore constitutionally and legally supersede any and all contract rates. Other theories of case law need not be noted.

Let the judgment *nisi* be affirmed. It is so ordered. All concur.

CHARLES WRIGHT et al., Appellants, v. CITY OF JOPLIN et al.

Division One, July 5, 1918.

1. **STREET AND LOTS: Plats and Measurements: Conflict.** By Section 6573, Revised Statutes 1879, the platting of ground had the same legal effect to dedicate to public use the streets and alleys therein described as would a conveyance directly to the city; and when the owners of the lots and blocks fronting on said streets and alleys as shown by the plat sell them to third parties, the title to the streets and alleys cannot be questioned by the city or by the purchasers of other lots, nor can the rights of the purchasers of lots to access to the streets and alleys as shown by the plat be questioned by purchasers of other lots embraced within the plat. [Following *Laddonia v. Day*, 265 Mo. 383.]

Wright v. City of Joplin.

2. ———: ———: ———: **Plat Determinative.** When the plat of an addition has been executed and filed in conformity with the statute, the streets and alleys indicated by the plat as actually fitted to and laid out on the land, and not as indicated by calls of measurements, courses and distances as shown by field notes of the surveyor, became vested absolutely in the city for the use of the public. If there is a conflict between said plat and the measurements of a survey—if the plat designated certain streets and they were actually laid off on the surface of the ground by the dedicators as indicated by it and as subsequently used by the public, and lots were sold and improved in conformity to stakes and boundary lines, which also were in conformity to the plat, although the field notes attached to and filed with the plat described the tract as 1320 feet square, when as shown by the plat the tract was 1325 feet east and west, and as shown by a subsequent survey was 1300 feet on the north line thereof and 1299.7 feet on the south line—the plat must prevail, and the city cannot change the lot lines as shown by it, nor re-establish the streets and alleys in accordance with the actual measurements.

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,*
Judge.

REVERSED AND REMANDED.

Hugh Dabbs and W. J. Owen for appellants.

(1) Where the land, as in this instance, was actually surveyed and stakes set out to indicate the various lots, streets, and alleys by the proprietors, and were fenced and improved, and the streets and alleys opened and used in accordance with these stakes, and the conduct of the first settlers shown a uniform understanding, such lines so shown to exist cannot be changed by subsequent surveys. *McKinney v. Doane*, 155 Mo. 288; *Jones v. Poundstone*, 102 Mo. 240; *Wayssville v. Truex*, 235 Mo. 628; *Whitwell v. Spiker*, 238 Mo. 638; *Thrush v. Graybill*, 81 N. W. 798; *Root v. Town*, 54 N. W. 206; *Stetson v. Adams*, 39 Atl. 375; *Bean v. Bachelder*, 3 Atl. 279; *Ripley v. Berry*, 17 Am. Dec. 201; *Halst v. Streitz*, 20 N. W. 307; *Richardson v. Chickering*, 77 Am. Dec. 269; *Kellog v. Mullen*, 45 Mo. 571. (2) Tradition, reputation, hearsay, visible monuments, both natural and artificial, conduct of first settlers, uniform constructions and im-

Wright v. City of Joplin.

provements, testimony of any one having knowledge of the facts may be employed to prove and establish the true lines as staked out and marked by the original proprietors upon the ground. *St. Louis Pub. School v. Risley Heirs*, 40 Mo. 371; *Marysville v. Truex*, 235 Mo. 628; *Whitwell v. Spiker*, 238 Mo. 638; *Kronenberger v. Hoffner*, 44 Mo. 192; *Whitehead v. Regan*, 106 Mo. 235; *Jacobs v. Mosley*, 91 Mo. 460; *Major v. Watson*, 73 Mo. 662; *Mayor of Liberty v. Burns*, 114 Mo. 430. (3) The particulars of the description contained in a plat are not conclusive of the correctness of such description, and is only a picture of the survey from which it was made, and is only intended to be a representation of the actual survey as made upon the ground. *Coleman v. Lord*, 52 Atl. 645; *Whitwell v. Spiker*, 238 Mo. 638. (4) The city improved some of these streets, laid water mains therein, put in culverts, and street cars operated thereon, and all conforming to lines as marked and staked out by original proprietors, and all of these facts evidenced dedication and acceptance. *Rose v. St. Charles*, 49 Mo. 510; *Naylor v. Harrisonville*, 207 Mo. 349; *Benton v. St. Louis*, 217 Mo. 703.

E. F. Cameron for respondent.

(1) When an authenticated plat of a sub-divided tract of land is referred to in a deed conveying a subdivision of such tract, the plat becomes as much a part of the deed as if fully incorporated in it. *Whitehead v. Ragan*, 106 Mo. 231. (2) Equity will interfere to ascertain and fix boundaries where the rights of a large number of persons are, as in the present case affected, and the confusion of boundaries has been occasioned by lapse of time, accident or mistake, and a necessity arises therefrom to adjust such conflicting claims, and thus prevent multiplicity of litigation. *Frame v. Roboteau*, 56 Mo. 415; 1 *Story's Equity Jurisprudence*, sec. 621. (3) The lines that appellants contend for have long since become obscured, if not entirely obliterated. The monuments are gone. In such a case equity has

jurisdiction to settle them. *Watkins v. Child*, 11 Am. & Eng. Ann. Cases, 1123. (4) When a plat is filed to an addition in a city or village that is not incorporated, the fee of such land conveyed as aforesaid shall be vested in the proper county in trust for the uses and purposes mentioned in said plat. Sec. 10294, R. S. 1909. There need not be an acceptance by the county or by the city to vest this title. *Hill v. Hopson*, 150 Mo. App. 611; *Brown v. Carthage*, 128 Mo. 17.

WOODSON, J.—The plaintiffs instituted this suit in the circuit court of Jasper County against the defendants, for the purpose of having the streets and alleys in First Addition to East Joplin City, now incorporated in and constituting a part of the City of Joplin, Jasper County, Missouri, as laid off on the surface of the ground by the original owners of the land on which the addition is located, ascertained, determined and established. The full prayer is "that the said streets and alleys as laid off on the surface of the ground by the original owners be ascertained, determined and established, and the acts of said original owners be confirmed and adjudged; that all lots and tracts of land owned by plaintiffs and others likewise situated in said addition be ascertained, determined, established and adjudged as the same was laid and staked off by the original owners on the surface of said ground; that said defendant, City of Joplin, be perpetually enjoined and restrained from changing the lot lines as originally established by the original owners, of the streets and alleys, as laid off and established by the original owners, or from exercising any dominion over any part of the lots and tracts of ground owned by these plaintiffs, inconsistent with lines and boundaries as laid off and staked on the surface of said ground by the original owners; and that said defendant city be perpetually enjoined and restrained from passing any ordinances authorizing any improvements otherwise than in conformity with the lines made by said original owners; that said defendant V. E. Koch, a contractor,

be perpetually enjoined and restrained from putting in any street crossing, constructing any sidewalk or making any other improvements that will change or interfere with any of the boundary lines, marks or monuments established by the original owners of said ground as aforesaid; that both of said defendants be perpetually enjoined and restrained from doing any act of trespass upon the realty of these plaintiffs, or prevent them in any manner from occupying and enjoying the tracts and lots of land claimed by them to be the boundary lines as laid and staked off by said original owners, subject to the city's rights as a municipal corporation, and plaintiffs pray for all such other, further and general orders, judgments and decrees touching the premises, as to the court shall seem meet, just and proper, and for costs of suit."

The material parts of the answer are as follows:

That on the 30th day of May, 1872, the owners of the southeast quarter of the northeast quarter of section two, township twenty-seven, range thirty-three, Jasper County, Missouri, being the same owners as those said owners who platted the said addition entitled "East Joplin City," as aforesaid, made and executed a plat of and dedicated a town addition located on said last mentioned land, and entitled the same, "First Addition to East Joplin City," a copy of which marked "Exhibit C" and "Exhibit D" is attached hereto and the same, together with the notations and averments thereon, are made a part hereof and of the averments of this answer, the said plat being duly filed for record in the office of the Recorder in said Jasper County, Missouri, on the 3rd day of June, 1872; and that said plat, with the dedication of the streets and alleys to the public use as therein provided, at all times since, has been accepted, recognized and treated as an addition to the city of Joplin, by this defendant and the municipal corporation of which it is the successor.

But said defendant further says that by reason of mistake and accident in computing and drafting said plat of East Joplin City, the same is inconsistent and re-

Wright v. City of Joplin.

pugnant, for that the call for the external lines of said addition are 1320 feet north and south, and 1320 feet east and west, but calls for the lots and subdivisions thereof aggregate 1325 feet east and west, while the dimensions of the designated forty-acre tract whereon the plat is located are only about 1300 feet east and west, and about 1218 feet north and south. That by reason thereof the lines and limits of the said addition and the lots, streets, alleys, and subdivisions thereof, and by reason of the lapse of time, carelessness of the occupants, mistaken and conflicting surveys, and absence of any fixed monuments, have become confused and uncertain, and likewise the lines and limits of the said First Addition to East Joplin City, and because the same is on the contiguous subdivision of the same quarter section as East Joplin City, and conflicts with and overlaps the plat of said East Joplin City, and because of the lapse of time, carelessness of the occupants, mistaken and conflicting surveys, and absence of any fixed monuments, have also become confused and uncertain. That by reason thereof the external lines of both said additions, and of the lots, streets, alleys and subdivisions have been and are now obliterated, so that no one of the plaintiffs is occupying according to the original boundaries of his premises, and by reason of such conditions and the said state of affairs the lines of the streets and alleys of the said defendant, City of Joplin, in both said additions, are confused, irregular, uncertain and their true limits obliterated, nor is this defendant able with reasonable accuracy, to locate, by any personal knowledge of its officers, agents or servants, or by public records as exist, the physical location, metes, and bounds of the streets and alleys of said addition, dedicated to the public use and intended to be under said defendant's supervision and control.

And said defendant says, following upon the uncertainty, mistakes, confusion in respect of said lines as aforesaid, the plaintiffs herein and numerous of the other occupants of said additions have been and are encroaching upon the streets and alleys thereof,

and proposing and threatening to resist every effort of said defendant to exercise authority over such streets and alleys, and threatening to enjoin said city and its officers and to prevent any work of improvement in said streets or alleys or parts thereof. That the said defendant is embarrassed and impeded in making necessary and proper improvements upon its streets and alleys, and in attempting to perform such duties in the premises would inevitably and necessarily become involved in controversies and litigation with a great number of the owners of the lots and parcels of said addition, and delayed by long, continued, vexatious and unreasonable litigation, cost, and expenses, as well to the property owners in said additions as to this defendant.

And defendant says that all of the parties plaintiffs, and all the numerous owners, residents, and occupants of all and every the various lots and tracts and parcels in said additions, more numerous than is practicable to bring them all before this court, are equally interested in having the boundaries and lines of said additions and of the streets and alleys thereof determined in one action, and that the same is necessary in the premises, in order to avoid a multiplicity of suits at law, and which would necessarily have to be resorted to if the relief prayed for in this answer be denied.

Wherefore, said defendant, City of Joplin, prays that the court correct and amend the said East Joplin City plat, and harmonize and adjust the lines thereof in accordance with the intentions of the grantors thereof; and that the court fix and determine the external boundaries of both said additions, and the lines and boundaries of the streets and alleys thereof, as against the said plaintiffs, and by representation against all parties having a common interest in the subject of this action, and for any other and further relief as to the court may seem just and proper in the premises.

The reply was a general denial.

After hearing the evidence, which is very voluminous, the court found the issues for the defendants and rendered judgment as prayed for in the answer.

Wright v. City of Joplin.

After moving unsuccessfully for a new trial, the plaintiffs duly appealed the cause to this court.

In so far as the survey of this addition is concerned, the dedication of the streets and alleys to the public and the staking off of the lots and blocks according to their frontage upon said streets and alleys by the owners of the land platted in the year 1872, the evidence is practically undisputed.

The facts are tersely outlined by counsel for plaintiffs in their statement of the case, as will more fully appear presently from excerpts made from the finding of the court, which are preserved in the record.

The statement of counsel for the plaintiff is as follows:

"During the year 1872, and long prior thereto, John H. Taylor, S. B. Corn and others were the owners in fee of the southwest quarter of the northeast quarter of section 2, township 27, range 33, in this county, and they also owned the land surrounding, adjoining and adjacent thereto. They laid off this tract in streets, alleys and lots, as an addition to East Joplin City, now a part of the City of Joplin, and these plaintiffs, together with many other persons, became and are the owners of certain lots so laid off and sold by said owners.

"The lots so purchased and sold were improved by the purchaser, in conformity with certain stakes and boundary lines set and established by the owner. Said improvements were uniform and conformed to the streets and alleys, as then established and located on the surface of the earth.

"These plaintiffs, and other persons likewise situated, have since that date maintained their improvements in conformity with these lines, and still claim to the lines as originally laid off.

"Some time thereafter the city of Joplin made another survey of this land, which, if conformed to, would move all of the original owners, so that the streets, under the new arrangement, would cut twenty-five feet into the lots of the original owners and leave

twenty-five feet of the old streets, as a part of their holdings, and this suit was instituted in July, 1912, in an effort to set at rest as to whether the old, original owners should yield to the changed conditions as brought about by the city.

"The city of Joplin answered, admitting the ownership of the original holders and asserting the disputes as to the true lines, and joins with the plaintiffs in the request to have the boundaries and lines of said addition, and all of the streets and alleys thereof, determined."

The findings of the court insofar as they are material to the legal proposition presented for adjudication are as follows:

"The court now being fully advised in the premises doth find that the defendant, City of Joplin, is a city of the third class under the laws of the State of Missouri, and is the successor of East Joplin City, a municipal corporation of the State of Missouri, and of all additions heretofore made thereto, and of all the rights, privileges and jurisdiction thereof as limited by its authority and charter as such city of the third class, and that the southwest quarter of the northeast quarter of section 2, township 27, range 33, is within the corporate limits of said city of Joplin. That on the 18th day of March, 1872, the owner of said southwest quarter of the northeast quarter of section 2, township 27, range 33, made and executed a plat of said last described land, laying the same off into blocks, lots, streets, and alleys, and entitled the same 'East Joplin City,' and dedicated the streets and alleys to public use, which said plat, together with the field notes thereto attached, was filed for record in the Recorder's office of Jasper County, Missouri, on the 20th day of March, 1872. That said field notes described said tract of land so platted and laid out as being 1320 feet east and west and 1320 feet north and south; that said plat shows the aggregate width of said tract of land east and west to be 1325 feet, and the court finds from the evidence that the actual width of said tract of land east

Wright v. City of Joplin.

and west is 1300 feet on the north line thereof and 1299.7 feet on the south line thereof. That the measurements, call and distances in the field notes begin on the west line of said tract and extend eastward across the same, so that the actual size of said tract of land is 20 feet less at the north end and 20.3 feet less at the south end, than was platted, as shown by the field notes, and that the actual size of said tract of land east and west is 25 feet less at the north end and 25.3 feet less at the south end than was platted, as shown by said plat. Said plat shows a street 25 feet wide on the east thereof designated as Fifth Street, now named Hight Street, so that at the north line of said tract the west line of Fifth Street as shown by the plat is identical with the east line of said tract of land, and is .3 of a foot west of the east line of said tract of land at the south end thereof, and according to the field notes 20 feet of Fifth Street is east of the east line of said tract of land at the north end and 20.3 feet east of the east line of said tract of land at the south end thereof, therefore, according to said plat, the whole of Fifth Street was east of and entirely off of the said plat so platted, and according to the field notes 20 feet of Fifth Street was east of and off of said tract so platted, with a variation of .3 of a foot at the south end as above stated.

“That on the 30th day of May, 1872, the said owners of said land so platted and laid out as aforesaid, being also owners of the land immediately east thereof, to-wit, the southeast quarter of the northeast quarter of said section 2, township 27, range 33, made and executed a plat of said last described land, laying the same off in blocks, lots, streets and alleys, and entitled the same ‘First Addition to East Joplin City,’ and dedicated the streets and alleys to public use, which said plat, together with the field notes thereon and thereto attached, was filed for record in the Recorder’s Office of Jasper County, Missouri, on the 3rd day of June, 1872. That said field notes and also said plat described said tract of land so platted and laid off as being 1265.5

feet east and west, and the court finds from the evidence that the actual width of said tract of land east and west is 1301.01 feet on the north line thereof, and 1299.7 feet on the south line thereof. That the measurements, call and distances in the field notes begin at the west line of said tract and extend eastward across the same, instead of beginning at the east line of Fifth Street as laid off and platted by the plat of the First Addition to East Joplin City. A strip on the west side thereof 30 feet wide is designated as Fifth Street. The court finds that the owners of said two tracts of land so platted and laid off as aforesaid made surveys thereof and staked off the lots, streets and alleys by planting wooden pegs in the ground, so as to show the lines of the streets and alleys and the corner of the lots, but the exact dates thereof are not shown, but in the summer of 1872 lots were being sold and improvements being made thereon in accordance with the lines shown by said pegs. These improvements were on the south part of the addition, mostly in the vicinity of Hill Street and Main Street (now Broadway), and the improvements were made on lines east of the lines shown on said plat of said addition, but how far east cannot now be determined, the original pegs and also fences built while the pegs were standing having all disappeared, and there being a discrepancy of five feet between the lines called for by the field notes and the lines shown by the plat of East Joplin City, there is now no way to determine whether the pegs planted in the First Addition were located with reference to the east line of Fifth Street, as shown by the field notes or as shown by the plat of East Joplin City.

“Between the years 1872 and 1892, the houses now belonging to the plaintiffs and a few others were erected, consisting of residences and outbuildings and fences on the lines as originally shown by said stakes, and these improvements were mostly along Main Street (now Broadway) and Hill Street, some as far north as Valley Street. About the year 1892, the exact date not shown, the owners who platted and laid out these two

Wright v. City of Joplin.

tracts, being also the owners of the forty-acre tract lying immediately south of the First Addition to East Joplin City, sold said forty-acre tract, together with all the unsold lots in the First Addition to East Joplin City, to a company of persons who laid out said forty-acre tract and platted same as 'Taylor's Addition to East Joplin City,' and had the same surveyed, which survey showed the discrepancy between the lines of the old improvements in First Addition to East Joplin City and the lines according to the plat thereof, whereupon they made a survey of First Addition to East Joplin City and located the lines of the streets and alleys and lots in accordance with the plat thereof and planted stakes showing said lines, and proceeded to sell the unsold lots, and the purchasers of such lots began to build houses and fences in accordance with said last mentioned stakes and in accordance with the lines as shown by the plat of said First Addition, the old original stakes all being gone."

The court then proceeds at some length in finding how the streets and property situate in First Addition to Joplin City had been improved since the resurvey of the same was made by said purchasers of the unsold lots just mentioned, which was some twelve or fifteen yards after the original survey was made, which was in 1872. But all of these findings are foreign to the question here involved.

I. The only question presented by this record for determination is, which shall prevail, the plat of First Addition to Joplin City, as actually laid out, located and staked out upon the surface of the ground by the original owners of the land and the makers of the plat, or the plat that erroneously attempted to follow the calls for monuments, courses and distances?

While there is but one plat in controversy, yet when viewed from the two aspects mentioned, the streets and alleys, lots and blocks indicated by the former occupy ground quite different from that called for by the latter. The pleadings recognize this difference, and the

petition asks that the plat as actually laid out, located and staked off upon the surface of the ground be adjudged the true plat of the addition, while the answer asks that the court correct errors of the plat mentioned in the answer in conformity to the calls for the monuments, courses and distances as disclosed by the plat and field notes filed therewith.

We have just recently had this precise question before this court in the case of *Laddonia v. Day*, 265 Mo. 383, where we had under consideration Section 6573, Revised Statutes 1879, which also governs this plat, and is now Section 10294, Revised Statutes 1909. That section reads:

"If any person shall sell or offer for sale any lot within any city, town or village, or any addition thereto, before the plat thereof be made out, acknowledged and recorded, as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell. Such maps or plats of such cities, towns, villages and additions made, acknowledged, certified and recorder, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public uses in such city, town or village, when incorporated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose. If such city, town or village shall not be incorporated, then the fee of such lands conveyed as aforesaid shall be vested in the proper county in like trust, and for the uses and purposes aforesaid, and none other."

In discussing that statute, this court, on page 397, said:

"The question involved in this case is too important and far-reaching, either for good or evil, to rest unsettled, and for one I am now in favor of eliminating from the jurisprudence of this State, forever, all of the evil that still lingers in the law regarding this matter, which said Section 10294 was evidently designed to eradicate. In the administration of the law the courts have, at times, through inadvertence or over-

sight, overlooked said statute, and at other times have tried to harmonize it with the old rules of the common law regarding monuments, courses and distance governing the conveyance of rural property, when the two are as irreconcilable as are oil and water or good and evil, as is conclusively shown by the conflict mentioned in the cases before mentioned.

"The old rules of courses, distances and monuments when concededly applicable to the conveyance of rural property—after conveyance made and the vendee has been placed in possession of the property by the vendor, and large and lasting improvements have been made and placed thereon—the courts of this and many, if not of all, other states, have not hesitated for one moment to suspend through the application of the doctrine of estoppel, in order to carry out the real intent and purpose of the parties and to mete out equity and justice between them and their privies in contract, blood and estate.

"In many such cases that doctrine of estoppel has been applied to the conveyances of farms, to grants of rights of way for railroads, and even to the sale of city property.

"Those cases are so numerous and familiar to the bench and bar that it would be a supererrogation of labor and a waste of space to cite them.

"The courts in those cases work out through the principles of equity precisely what the Legislature evidently designed to accomplish by the enactment of the statute in question. Or in other words, the frequent errors and the many mistakes made by surveyors and property owners in laying out towns and cities and additions thereto, fraught with the hundreds of incidental and irreparable evils thereof, were the causes that gave birth to that statute; and the evident design was that when such a plat had been executed and filed in conformity to the statute *covering the land owned by the party making the addition and dedicating the streets and alleys indicated by the plat filed therewith*, then the

streets and alleys indicated by the plat as actually fitted to and laid out on the land, became vested absolutely in the town or city for the use of the public, and that is true whether the plat as actually located upon the ground by the owner, by the sale of lots or otherwise, conforms to the lines of the survey or not, and especially after lots have been sold by him according to the actual location of the plat.

“Neither the public, the owners of the streets, nor the purchasers of the lots are so much interested in the question as to whether or not the plat conforms to the points of the compass or to the lines of the survey of sections and quarter sections, as they are in the certainty of the location of the lots and blocks and streets and alleys.

“Monuments are easily removed or destroyed, and for that reason they frequently disappear; but additions to towns and cities, laid out into lots and blocks and streets and alleys, with buildings erected upon the former and the streets improved, which is the very purpose of the addition, are not easily removed or destroyed. In the latter case, if a mistake is made of the true line of the street or of a lot or block, as a rule it only affects the party or parties making it; but in the former, the city and every property owner in the addition is of necessity affected thereby; and if that rule and not the statute is observed, each and all of them will be more or less damaged thereby.

“Any other construction of the statute would practically nullify and destroy the highly remedial provisions thereof, and in case of a mistake as previously indicated, that entire part of the city, and all of the property owners therein, would be thrown into confusion and uselessly damaged more or less; and in many cases the damages would be irreparable.

“We, are, therefore, of the opinion that the judgment should be reversed and the cause remanded to the circuit court for a new trial in conformity to the views herein expressed.”

Townsend v. Schaden.

In brief, we tried to state that the platting of ground under this statute had the same legal effect to dedicate the streets and alleys therein described to the public as effectually as if they had been conveyed by deed directly to the city; and that when the owners of the lots and blocks fronting upon said streets and alleys as shown by the plat sell any or all of them to third parties, the title of the streets and alleys so dedicated cannot be questioned by the city, nor by other purchasers of other of such lots, nor can the rights of the purchasers of such lots to access to such streets and alleys as actually located be questioned by other purchasers of other lots embraced within the plat from the dedicators.

The views announced in the Laddonia case, *supra*, were confirmed by this court in the case of *Macom v. Brewster*, 273 Mo. 616, in an opinion written by BOND, J., on March 4, 1918.

For the reasons stated the judgment is reversed and the cause remanded to the circuit court with directions to render a decree for the plaintiffs as prayed for in the petition.

Blair, P. J., and Graves, J., concur.

CORNELIA TOWNSEND v. M. L. SCHADEN, Administratrix of Estate of GEORGE TOWNSEND, Appellant.

Division One, July 5, 1918.

1. **APPELLATE PRACTICE: Weight of Evidence: In Law Case.** A claim against an administrator for the recovery of the value of bonds borrowed by decedent from claimant and never returned, commenced in the probate court and taken by appeal to the circuit court, is an action at law, and if the verdict in favor of claimant is supported by substantial evidence, the trial court is within the law in overruling a demurrer thereto, and it is not the province of the appellate court to pass upon the weight of the evidence.

2. **WITNESS: Competency: Sister of Deceased Donor of Bonds.** Decedent by one letter addressed to two sisters gave one forty bonds and the other twenty, which he afterwards borrowed from them and did not return, and both bring separate actions against the administratrix for the value of the bonds given to them respectively. *Held*, that he made separate and distinct gifts to each, and though the gifts were made in the same transaction, yet as neither had any interest in the bonds intended for the other, neither is disqualified by the statute to testify as a witness for the other in her separate suit.
3. **GIFT: Intention and Delivery: Sufficient Evidence.** Where decedent by letter written in Indianapolis, directed to his sister, stated he was on that day sending to her, as a gift, at Chicago, forty bonds of a named company and of designated numbers, and on the same day entered in his diary a memorandum that he had given her said bonds, there is substantial evidence of his intention to give; and where, instead of sending them to her, by express as he had intended, he took them to the home of another sister and in her presence gave them to the designated donee, and then took them to a safety deposit box, where she found them a week later and where they remained for six months, when he borrowed them from her and by letter to her and by statements made to others admitted he had borrowed them, there is sufficient evidence of delivery, to support a verdict that the gift was complete, both as to intention and delivery.
4. ———: **Self-Serving Testimony.** Declarations or admissions of a donor as to the fact of delivery and as to his intention are admissible to support an alleged gift, but not to impeach his gift. Letters written or statements made by decedent subsequently to the time he made a gift of bonds to his sister, offered for the purpose of showing he had not given them to her, are self-serving and are not competent for that purpose.
5. ———: ———: **Explained By Other Witnesses.** A witness having testified that decedent declared he wished to return the bonds he had borrowed from his sisters, it was not error to refuse to permit another witness, who was present when the declarations were made, to testify that decedent said he was returning the bonds to his sisters for his own use, so that he might use them in case of necessity, because the proffered testimony was self-serving and could not be used to defeat the gift previously made.
6. ———: **Hearsay.** Statements made by decedent, at the time he wrote a letter to his sister in which he distinctly declared he was giving and sending her certain bonds, as to why he was writing the letter, were pure hearsay, self-serving and incompetent, when offered by his administratrix.

Townsend v. Schaden.

7. ———: **Conclusion.** Testimony as to why decedent turned to a diary at the time he wrote the letter of gift is a conclusion of the witness, and incompetent.
8. ———: **Instructions.** Instructions set out in the opinion embodied correct principles of law applicable to gifts *inter vivos*.
9. ———: **Limitations: Five Years.** An action of assumpsit brought by a sister in January, 1914, against the donor's administratrix, for the value of bonds given to her by her brother in October, 1907, and by him borrowed from her in March, 1908, and never returned, where the evidence shows the donor and donee had mutual dealings in regard to the bonds up to and including 1911, was not barred by the five-year Statute of Limitations.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson, Judge.*

AFFIRMED.

William G. Holt, Haff, Meservey, German & Michaels and Beardsley & Beardsley for appellant.

(1) There was no proof of a gift from George Townsend to the plaintiff of the 40 Water bonds and therefore the court should have directed a verdict for defendant. (a) Giving all possible weight to the testimony offered on plaintiff's behalf, there was no proof whatsoever of a delivery of the bonds in October, 1907. *Tomlinson v. Ellison*, 104 Mo. 105; *In re Estate of Soulard*, 141 Mo. 642; *McCord's Admr. v. McCord*, 77 Mo. 166; *Burchett v. Fink*, 139 Mo. App. 381; *Walter v. Ford*, 74 Mo. 195; *Harris Banking Co. v. Miller*, 190 Mo. 640; *Jones v. Falls*, 101 Mo. App. 536; *Pennell v. Ennis*, 126 Mo. App. 355; *Doering v. Kenamore*, 86 Mo. 588; *Citizens Nat. Bank v. McKenna*, 168 Mo. App. 254; *Gray v. Doubikin*, 188 Mo. App. 667; *Chambers v. McCreery*, 106 Fed. 364; *Basket v. Hassell*, 107 U. S. 602; *Reynolds v. Hanson*, 191 S. W. 1030; *Liebe v. Battman*, 33 Ore. 241, 54 Pac. 179; *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Apache State Bank v. Daniels*, 32 Okla. 121, 121 Pac. 237; 20 Cyc. 1234; 2 Kent. Com. 556; *Newman v. Bost*, 122 N. C. 524, 29 S. E. 848; *Bauernschmidt v. Bauernschmidt*, 97 Md. 35, 54 Atl. 637; *Millard v. Millard*,

221 Ill. 86, 77 N. E. 595; *Foley v. Harrison*, 233 Mo. 460. (b) The whole record shows that George Townsend never intended to make any gift of bonds to his sister in October, 1907; that the bonds in question were never treated by him or by her as having been so given and the attempted proof of a gift falls far short of the character of proof required to support gifts *inter vivos*. *Foley v. Harrison*, 233 Mo. 460; *Northrip v. Burge*, 255 Mo. 653; *Denny v. Brown*, 193 S. W. 552. (2) The alleged declarations of Townsend made to his relatives and partner subsequent to October, 1907, are valueless and ineffectual, because there had been no proof of delivery, and therefore the trial court should have disregarded them in passing on the demurrer to the evidence. *Chambers v. McCreery*, 106 Feb. 364. (3) The court erroneously excluded letters and statements of Townsend made or written subsequently to October, 1907, showing that he had not given any bonds in 1907 to plaintiff. *Simms v. Saunders*, Harper (So. Car.) 374; *Stone v. Stroud*, 6 Rich. (So. Car.) 306; *Exrs. McKane v. Bonner*, 1 Bail. (So. Car.) 113; *Caldwell v. Wilson*, 2 Spears (So. Car.) 63; *Chambers v. McCreery*, 106 Fed. 364. (4) The trial court, having permitted one of plaintiff's witnesses to relate a particular conversation with the deceased, should have permitted the other witness who was present to give her version of the same conversation. *Harmon v. Insurance Co.*, 170 Mo. App. 309; *Hodges v. Hill*, 175 Mo. App. 441; *Gourley v. Callahan*, 190 Mo. App. 666; *Enyeart v. Peterson*, 184 Mo. App. 522; *Crawford v. Stock Yards Co.*, 215 Mo. 416; 16 Cyc. 1039, 1041; *Reeves v. Hardy*, 7 Mo. 348; *Haver v. Schwyhart*, 48 Mo. App. 50, 54. (5) The court erred in excluding the testimony of Mrs. Schaden as to what Townsend said at the time when he wrote the letter which was dated October 25, 1907. *Stewart v. Glenn*, 58 Mo. 481; *McMahon v. Cronin*, 128 N. Y. S. 425. (6) The court erred in striking out certain statements of Mrs. Schaden with reference to the writing of the letter dated October 25, 1907. (7) The court erred in giving instructions "A" and "B" of its own motion.

Black's Law Dictionary, "Reasonable;" *Foley v. Harrison*, 233 Mo. 589; *Hunt v. Railroad*, 126 Mo. App. 83; *Smith v. City of Brunswick*, 61 Mo. App. 581. (8) The five-year Statute of Limitation is a bar to plaintiff's claim. (9) Mrs. Davis was an incompetent witness. Sec. 6354, R. S. 1909. (10) The finding of the jury in this case that there was a gift, since it has no foundation in fact upon which it can stand, calls for a reversal outright. *Beaver v. Beaver*, 117 N. Y. 421, 6. L. R. A. 403, 15 Am. St. 531.

Lynn S. Pease, Walter F. Mayer and H. F. Wieman
for respondent.

(1) The intention of the donor to make a gift is the controlling element and factor to establish a gift. *Hamilton v. Armstrong*, 120 Mo. 597; *Richardson v. Richardson*, 148 Ill. 563; *Devol v. Dye*, 123 Ind. 321; *Weaver v. Weaver*, 182 Ill. 287; *Weber v. Christen*, 112 Ill. 91; *Rumsey v. Ottis*, 133 Mo. 85. (2) The admissions, declarations and acknowledgments of the donor are competent evidence to prove any of the essential elements of a gift. *Lord v. N. Y. Life Ins. Co.*, 66 S. W. (Tex.), —; *Crouse v. Judson*, 84 N. Y. S., 755; *Grangiac v. Arden*, 10 Johns. 293; *In Re Townsend*, 5 Dem. Sur. 147; *Estate of Soulard*, 141 Mo. 642; *Bank v. Miller*, 190 Mo. 640; *People v. Benson*, 99 Ill. App. 325; *Sparling v. Smeltzer*, 133 Mich. 454; *Jacques v. Fourthman*, 137 Pa. St. 428; *Weaver v. Weaver*, 182 Ill. 287; *Dehm v. Dehm*, 86 Ill. App. 479; *Brandon v. Dawson*, 51 Mo. App. 237. (3) The delivery of the gift as a manifestation of the intention of the donor may be actual, constructive or symbolical. Delivery may be made to a third person to be by him delivered to the donee. *Reese v. Phila. Trust Co.*, 218 Pa. 150; *Hamilton v. Armstrong*, 120 Mo. 597; *Hageman v. Hageman*, 90 Ill. App. 251; *Devol v. Dye*, 123 Ind. 321; *People v. Benson*, 99 Ill. App. 325; *Shackleford v. Brown*, 89 Mo. 546; *Sneathen v. Sneathen*, 104 Mo. 201; *Bickford v. Mat-tacks*, 95 Mo. 547; *Grangiac v. Arden*, 10 Johns. 293; *Hall v. Hall*, 76 Kan. 806; *Seavey v. Seavey*, 30 Ill. App.

625; Telford v. Patton, 144 Ill. 619; Williams v. Latham, 113 Mo. 165; Waite v. Grubbe, 43 Ore. 406; Muir v. Gregory, 168 Fed. 641; Hess v. Hartwig, 83 Kan. 592; Marsh v. Fuller, 18 N. H. 360; In Re Palmer's Estate, 102 N. Y. S. 236; Jast v. Wolf, 130 Wis. 37; Bates v. Vary, 40 Ala. 421; Sparling v. Smeltzer, 133 Mich. 454. (4) The donor may hold the subject of the gift, constructively deliver the property to himself for the donee and thereby put himself in the position of trustee for the donee. The donee need not have possession of the subject of the gift. Harris Bank v. Miller, 190 Mo. 640; Mize v. Bank, 60 Mo. App. 358; Hamilton v. Armstrong, 120 Mo. 597; Yokem v. Hicks, 93 Ill. App. 667; Martin v. Funk, 75 N. Y. 134; Grangiac v. Arden, 10 Johns. 293; Trowell v. Carroway, 10 Heisk. 104; Dressen v. Dressen, 46 Me. 48; Bants v. Ellis, 17 Beav. 121; Gamian v. McGuire, 160 N. Y. 476; Crouse v. Judson, 84 N. Y. S. 755. (5) The questions of intention and delivery are exclusively within the province of the jury. The jury may presume intention and delivery from the facts and circumstances, admissions, declarations and acknowledgments of the donor. Reynolds v. Hanson, 191 S. W. (Mo.) 1030; Fair v. Wynne, 155 Mo. App. 341; Sparling v. Smeltzer, 133 Mich. 454; Jacques v. Fourthman, 137 Pa. St. 428; Clough v. Clough, 117 Mass. 85; Hunt v. Hunt, 119 Mass. 474; Keeney v. Henrick, 148 Pa. St. 223; Sprouse v. Littlejohn, 22 S. C. 358; Grangiac v. Arden, 10 Johns. 293. (6) The appellate court will not weigh the evidence and set a verdict aside as against the weight of the evidence. Reynolds v. Hanson, 191 S. W. (Mo.) 1030; Shackelford v. Brown, 89 Mo. 546. (7) Mrs. Davis was a competent witness. Snider v. McAtee, 178 S. W. (Mo.) 484; McKee v. Downing, 224 Mo. 115; Cole v. Waters, 164 Mo. App. 567; Morvell v. Cooper, 155 Mo. App. 445; Weiermueller v. Scullin, 203 Mo. 467; Gray v. Doubikin, 188 Mo. App. 667. (8) Conversations with and letters written by the deceased which were not declarations or admissions against interest are not competent evidence. Baker v. Baker, 43 Ind. App. 26; Hitt v. Hitt, 131 S. W. (Mo.)

Townsend v. Schaden.

369; Dalby v. Maxfield, 244 Ill. 214; Tyler v. Wright, 164 Mich. 606; Reese v. Trust Co., 218 Pa. 150; Church v. Comb's Ex'r, 113 S. W. (Ky.) 119; Mahan v. Schroeder, 142 Ill. App. 538; Dillivan v. Savings Bank, 124 N. W. (Ia.) 350; Driscoll v. Driscoll, 143 Cal. 528. (9) The court properly instructed the jury that "the plaintiff must prove to your reasonable satisfaction by the greater weight of all the credible evidence," etc. Jones v. Park, 101 Mo. App. 536; Reynolds v. Hanson, 191 S. W. (Mo.) 1030. (10) The five-year Statute of Limitations does not apply in this case.

RAILEY, C.—This action was commenced in the probate court of Jackson County, Missouri, on January 8, 1914, in the following form:

"Estate of George Townsend, deceased, to Cornelia Townsend, debtor,

"To one hundred shares of the Central States Bridge Company, par value one hundred dollars \$10,000

"To thirty-two bonds, Citizens Street Railway Company, Indianapolis, par value one thousand dollars 32,000

"To eight water bonds, City of Indianapolis, Indiana, par value one thousand dollars . 8,000

"Total\$50,000"

Before the case was finally submitted to the jury, plaintiff reduced her demand for the par value of the thirty-two Citizens Street Railway Company bonds, of Indianapolis, Indiana, from \$32,000 to twelve of said bonds of the alleged value of \$12,000. She also withdrew from the consideration of the jury, as shown by her instruction "D," that part of her claim relating to the one hundred shares of the Central States Bridge Company, of the alleged value of \$10,000.

From the judgment of the probate court in favor of defendant, plaintiff appealed to the circuit court, where the case was tried *de novo*, at the November Term, 1914, before a jury. The trial began on January

5, 1915, and thereafter resulted in a verdict for plaintiff in the sum of twenty thousand dollars, upon which judgment was entered in due form.

There was substantial evidence offered upon the part of plaintiff tending to show that George Townsend, who was a brother of plaintiff, on or about the 25th day of October, 1907, had met with success as a railroad builder, and had accumulated at that time valuable bonds and notes of the face value of \$250,000; that he and plaintiff were twin sister and brother, and that for many years they made their home with their sister, Mrs. Anna Townsend Davis; that plaintiff and her brother George were dear to each other, and traveled a great deal together.

Plaintiff introduced in evidence her Exhibit 6, shown to have been in the handwriting of George Townsend, which reads as follows:

"Indianapolis, Oct. 25, '07.

"My dear Sisters:

"I have this day paid off my loan at the Fletcher Bank and am not now honestly in debt to anyone in the world and I am entirely out of business. I have now in my safe deposit box at Fletchers, 150 Indpls Water, Citizens Ry and other bonds paying me 5% interest, besides 100 New Orleans Ter. Notes in the 1st Natl Bank of N. Y. and other investments, and so I have decided to carry out my long promised intention made so often to you and Nellie of adding to the bonds you already have so that you will both be provided for should bad luck come to me or in case of my marriage and so I will today take with me or send to you in Chicago, as a present sixty (60) of the Water and Citizens bonds, Forty (40) of which will be for Nellie and twenty (20) for Anna, because Nellie is more dependent on me than you are. You must take good care of these bonds and do not change the investment into other bonds or stock without first advising with me. These bonds all pay 5% per annum; the water bonds sell around par and the Citizens sell a few points higher but I consider them equally safe as an investment. You can divide the two kinds as you see fit so that Nellie gets a total of 40 and you get the 20. I take pleasure in doing this as it will still leave me a sufficient income.

"Love to you both,
BROTHER GEORGE.

Townsend v. Schaden.

"This is a list of the numbers of the bonds I am giving you so in case anything happens in transit payment might be stopped. The 40 Water bonds numbers 76, 77, 196, 311, 312, 352, 1413, 1885, 1942 to 46, 1975 to 79, 2011, 2013, 2013, 2094, 2096, 2097, 2107 to 11, 2134, 2135, 2144, 2145, 2148 to 53 and 2202. The 20 Citizens bonds are numbered 6, 24, 25, 26, 27, 133, 134, 142 to 145, 284, 290, 393 to 397, 402 and 403.

GEORGE.

"Since writing the above I find it is too late to express these bonds and catch my train so I will leave them here at Fletchers and put a slip in the pkg of 40 water bonds as being the private property of Nellie and a slip in the pkg of 20 Citizens bonds as being the property of Anna and I will either continue to hold them here for you or send them to you at a later date.

Yours,

GEORGE."

A book was identified by Mrs. Davis, as a diary of George Townsend, and in his handwriting, under dates of October 24-5-6. It was introduced in evidence, and read as follows:

"(October 24th.)

"Arrived in Indianapolis at 3:05 p. m.

"Took dinner with Mrs. Schaden.

"Took room at Columbia Club.

"(October 25th.)

"Paid Fletcher my last loan and put 35 Water, 15 Citizens 30 N. W. & 10 U. T. bonds in my deposit box. Took 40 Water & 20 Citizens as a present to my Sisters in Chicago. Arrived home at 8:00 p. m.

"(October 26th.)

"Gave Sister Nellie 40 Water bonds and to Sister Anna 20 Citizens. Had hair cut in the p. m. Played cribbage at home in the evening with the folks."

Mrs. Davis identified "Exhibit 3" as in the handwriting of her brother George, and says she received it through the mail. It was offered in evidence and reads as follows:

"Grand Hotel,

Indianapolis,

January 3rd, 1910

"My dear Sisters:

"It is with a feeling of great relief that I am sending back to you today by Am. Express thirty-two of the \$1,000 bonds of the Citizens 5.s Street Ry. being a part of the 60 bonds that I took from those belonging to you in the safety deposit box in Chicago.

"I will send you 18 more bonds tomorrow and the remaining 10 bonds shortly.

Townsend v. Schaden.

"I want Nellie to receive back these 32 bonds and Anna can take her 20 out of the remainder I am to send.

"I trust you will forgive me for having taken the 60 bonds away from you against your protest. Please put these 32 bonds in a box in your own names.

With love,
GEORGE."

Mrs. Davis testified that the 32 bonds referred to in above letter were delivered to herself and plaintiff; that she handed them to George Townsend and they were put in the box. This occurred some time in December, 1909, or early in January, 1910; that these 32 bonds, in September, 1911, were sent by her to defendant for George Townsend; that this was the last time she ever saw them; that she could not give the exact date when she received Exhibit 6, *supra*, nor whether she had it in her possession before the death of her brother George; that she found it in the desk at home with other papers within the last year. Witness said her brother George felt grieved over plaintiff's health, and gave her seventeen bonds for her *immediate* wants, and said he would add three more to them, and that he would have that amount taken from the will; that plaintiff still has the seventeen bonds.

On cross-examination, Mrs. Davis testified that her brother George was a railroad builder, and had built many railroads; that he was a careful and successful business man; that he engaged in building railroads in Indianapolis, Michigan and the Holy Land; that he also built part of the Canadian Pacific road; that the first time she recalls having seen Exhibit 6 was in May, 1910; that it was then in her husband's desk in her room; that her brother George was very ill in January and February, 1910, and went to a sanitarium; that he had a nervous breakdown; that plaintiff never had any bonds prior to October 25, 1907.

Mrs. Davis testified in chief that in October, 1907, her brother George came to her house, and in the presence of plaintiff said he had brought to Cornelia

forty Water bonds, and twenty for her; that they thanked him, and he then said they should be taken right over to the safe deposit; that the above occurred about 8:30 o'clock in the morning; that she did not see the bonds, but simply the package; that he took them out of his satchel, put them in his pocket, and left; that she did not see the bonds until about one week afterwards, when she saw them in the box at Commerce Safety Deposit Company; that she had access to the box; that she had two boxes, and had the only key to each box at that time; that she had had the key since 1905; that when she went to the bank about one week after the above conversation, she then saw one package containing 40 Water bonds and one containing 20 Indianapolis Railway bonds; that the memorandum on the package was in the handwriting of her brother George. Witness testified that while she and her brother George were in the South, he spoke of the pleasure it had afforded him to have Cornelia provided with an income-bearing fund. This was in January, 1908. The bonds remained in the deposit box until March, 1908, when they were borrowed by her brother.

Ward S. Arnold, former partner of George S. Townsend, met the latter in Chicago in March, 1908. He testified that George then told him that "he had given his sisters a considerable amount of bonds, and that to raise the amount of money that would be required he would have to borrow these bonds back." He said, George then told him that "he had given Cornelia a considerable sum, more than his sister, Mrs. Davis, due to the fact that she was single and had no one to help look after her, like her other sister, Mrs. Davis." etc.

Wm. R. Townsend testified that in September, 1908, his brother George told him that "he had presented his sisters with enough bonds to keep them comfortably until the end of their lives." He said he was then in condition to do so. On cross-examination, witness said George told him in 1909 he had provided for his brothers and sisters in his will and that he was worth \$250,000 to \$300,000. He said that George talked

with him during the last days of December, 1909, and told him he was going to Indianapolis and get the bonds that were there, buy some more, and replace some he had *borrowed*; that he was afraid he would die and not leave them in possession of his sisters.

Edward Waterman Townsend testified that near the end of the year 1907 his brother George talked with him about Cornelia; that he then said, he had provided by gift, a provision which would provide means of a living for his sister.

The testimony of Mrs. Davis tends to show that George Townsend *borrowed* from her sister, Cornelia, the 40 bonds of plaintiff and took them with him. Witness said she never saw the bonds after that, but she got the 32 Citizens Street Railway bonds from the bank; that they were sent by express from her brother George, for Cornelia. These are probably the bonds referred to in Exhibit 8, heretofore quoted. Mrs. Davis said her sister Cornelia protested against her brother George going into business again, on account of his health, but told him "the bonds are here safe and we are perfectly willing to lend them to you, but we merely protest on account of your health," and he said he would take them with him.

We have simply set out enough of the testimony to show that plaintiff's demand is sustained by substantial evidence relating to the main issues before us. Some of the foregoing facts are controverted by testimony elicited on behalf of appellant.

The instructions given and refused, and such other matters as may be deemed important, will be considered in the opinion.

On January 12, 1915, nine of the jurors returned a verdict in favor of plaintiff for \$20,000, and judgment was entered in due form thereon. Motions for new trial and in arrest of judgment were filed, overruled, and the cause duly appealed by defendant to this court.

I. It is claimed that at the conclusion of plaintiff's evidence, and at the conclusion of the whole case, defendant's demurrer thereto should have been sustained.

We have shown from the preceding statement that respondent was well fortified at the trial with substantial evidence tending to prove the main issues in the case. As this is an action at law, it is not the province of the court to pass upon the weight of the evidence. [Minor v. Burton, 228 Mo. l. c. 564; Slicer v. Owens, 241 Mo. l. c. 323; Abeles v. Pillman, 261 Mo. l. c. 376; Buford v. Moore, 177 S. W. (Mo.) l. c. 872; Kille v. Gooch, 184 S. W. l. c. 1160; Truitt v. Bender, 193 S. W. (Mo.) 839; Coulson v. La Plant, 196 S. W. (Mo.) l. c. 1146.]

The trial court was within the law in overruling the above demurrer.

II. The trial court is charged with error in permitting Mrs. A. T. Davis to testify as a witness in behalf of plaintiff. It is conceded that she has a similar suit against the same defendant now pending in Division Two of this court.

It is contended by appellant that there was no gift of the bonds to either Mrs. Davis or plaintiff, on October 26, 1907, but that, if there was a valid delivery of the bonds, under the circumstances heretofore set out, it was a joint gift, which took place as part of a single transaction, and, hence, rendered Mrs. Davis an incompetent witness, under the statute, as her brother was then dead. On the other hand, it is contended by respondent that the correspondence read in evidence, in connection with the other facts, and what occurred on October 26, 1907, constituted separate gifts of different bonds. That is to say, the 40 Water bonds were intended for plaintiff, and the 20 Street Railway bonds for Mrs. Davis.

Let us assume for the sake of the argument that decedent, in the same transactions, intended to give and did give 40 of the Water bonds to plaintiff and the

20 Railway bonds to Mrs. Davis. On this state of facts, if said bonds had passed into the hands of defendant upon the death of George Townsend, it is plain that each of said donees could have recovered the possession of her respective bonds in an action of replevin. Even if the 60 had *all* been Water bonds, of the same value, plaintiff could have maintained an action of replevin for 40 of same, and Mrs. Davis could have recovered the remainder. [In re Estate of Lague, 267 Mo. l. c. 116-17, 183 S. W., l. c. 611.]

The question under consideration recently came before Division Two of this court in Snider v. McAtee, 178 S. W. 484. It appears from the opinion that Mr. Sperling was offered as a witness in behalf of plaintiff. Defendant objected to his testifying in the cause, on ground that he, Mr. Snider, and Mr. Schwab, were all parties to the same contract with Mr. Quinn, and that, as Quinn was dead, Sperling was incompetent to testify by reason of the provisions of Section 6354, Revised Statutes 1909. Judge WILLIAMS wrote the opinion, while a Commissioner, in which all the members of said Division concurred. On page 488, he said:

“We have reached the conclusion that the witness was not a party to the contract or cause of action in issue and on trial in this case. The evidence shows that all of the three purchasers were present in the bank at the time Quinn sold the 65 shares of stock. But it appears, we think, clearly, from the evidence, that, before the sale was made, each purchaser, for himself, decided upon the number of shares he would purchase. The transfer of the stock was made separately to each individual purchaser, and each purchaser respectively paid Quinn for the shares so purchased.”

It was held that Sperling was a competent witness, under the circumstances aforesaid.

In the case at bar, it appears from the diary kept by George Townsend, under date of October 26, that he “gave Sister Nellie 40 Water bonds and to Sister Anna 20 Citizens.” While he usually addressed his

sisters jointly, it is manifest from what he said, and did, that he was making separate and distinct gifts to each, and that neither had any interest in the bonds intended for the other.

The question under consideration is similar in principle to that involved in the Snider case, *supra*. The rule as announced in the latter meets with our approval. There is nothing contained in Section 6354, Revised Statutes 1909, which would warrant us in excluding Mrs. Davis as a witness in this cause, on the record before us.

III. It is contended by appellant that:

"There was no proof of a gift from George Townsend to the plaintiff of the 40 Water bonds and therefore the court should have directed a verdict for defendant."

The testimony heretofore set out indicates a clear intention upon the part of George Townsend on October 25, 1907, to give plaintiff 40 of his Water bonds. Without repeating the testimony, it is plain that the jurors had before them substantial evidence, tending to establish the following facts: That on October 25, 1907, George Townsend fully intended to give plaintiff 40 of his Water bonds; that he took said bonds with him to Mrs. Davis's house on October 26, 1907, and told plaintiff in the presence of Mrs. Davis that he had brought her the 40 bonds; that he gave them to her, and took them to the safety deposit box; that one week thereafter, plaintiff and her sister found the bonds at the bank; that one package contained 40 Water bonds and the other package 20 Railway bonds; that the 60 bonds remained in the bank until March, 1908, when George Townsend borrowed them from plaintiff and her sister; that he never returned the same; that on January 3, 1910, he wrote Exhibit 8, heretofore set out, in which he admitted the receipt of said bonds, and that they belonged to plaintiff and Mrs. Davis. In Exhibit 8, he further stated:

"I want Nellie to receive back these 32 bonds and Anna can take her 20 out of the remainder I am to send.

"I trust you will forgive me for having taken the 60 bonds away from you against your protest."

Where the facts are known and unquestioned, and where but one conclusion can be drawn therefrom, the court may, as a matter of law, on the evidence adduced, declare that no delivery has taken place. The law, however, as applied to facts like those before us, is forcefully stated in 12 Ruling Case Law, sec. 46, pages 974-5, as follows:

"The question as to what constitutes a gift is a question of law, and on facts in a particular case it involves a mixed question of law and fact. On the testimony it is the province of the jury to determine whether there was a clear intention to make a gift, and whether that intention was carried into effect by such a delivery as would make a completed gift. This is so as to a gift *causa mortis* as well as to one *inter vivos*."

The rule above announced is substantially in accord with the views of this court as heretofore expressed. [Harvey v. Long, 260 Mo. l. c. 386, and cases cited; Schooler v. Schooler, 258 Mo. l. c. 91-2; Miles v. Robertson, 258 Mo. l. c. 724, and following; Burke v. Adams, 80 Mo. l. c. 511; 8 Ruling Case Law, sec. 50, page 980.]

In the Burke case *supra*, Judge PHILIPS, while a Commissioner of this court, on page 511, very clearly stated the law as applied to the facts of this case, as follows:

"What constitutes a delivery of a deed is often a mixed question of law and fact. An arbitrary rule ought not to be laid down. Each case must stand more or less on its peculiar facts. The intent to convey is evidenced by the act of making out and duly executing and acknowledging a deed. The delivery may be evidenced by any act of the grantor by which the control, or dominion, or use of the deed is made available to the grantee. It is not necessary that it should be handed

over actually to the grantee, or to any other person for him. It may be delivered under certain circumstances, though it remain in the possession of the maker. Where, however, there is not an actual transfer from the grantor to the grantee, it should affirmatively appear from the circumstances, acts or words of the parties, that the intention to pass the title really existed."

In the case at bar, there is abundant evidence of an intention upon the part of George Townsend to deliver the 40 Water bonds to plaintiff. The testimony shows: He had withdrawn these bonds from the bank to deliver to her; that he formally declared he had brought them to her; that he exercised proper care in not leaving such a large amount of securities in her hands, but took them to the custodian of the vault for her; that she got them from the vault within a week afterwards, and they remained there until her brother borrowed them from her, and never returned the same. He recognized, in writing, her ownership of the bonds, and replaced 32 of the 40, with Railroad bonds. On this state of facts, the jury were warranted in finding that the 40 Water bonds were given to plaintiff, and in contemplation of law, were delivered to her.

(a) In 12 Ruling Case Law, sec. 45, pages 973-4, it is written:

"Declarations of the donor, especially if repeatedly made, are sufficient on which to establish a title by gift, and declarations of a donor that he had delivered a gift are sufficient evidence of its delivery, particularly where he had previously expressed his intention to give, and was under a moral obligation to make the gift."

(b) We have carefully considered the law relating to the question of delivery, as shown by the authorities cited in *Wren v. Sturgeon*, 184 S. W. 1. c. 1038-9, where we held that no delivery was shown by the evidence. Without considering the question further, we are of the opinion that the trial court committed no error in overruling appellant's demurrer to the testimony, in respect to above matter.

IV. Appellant claims, that "the court erroneously excluded letters and statement of Townsend made or written subsequent to October, 1907, showing that he had not given any bonds in 1907 to plaintiff."

If any such letters were written, or statements made by George Townsend, subsequent to October, 1907, and they were offered in evidence for the purpose of showing that he had not given any bonds in 1907 to plaintiff, they were properly excluded as self-serving declarations and incompetent for that purpose. [O'Day v. Annex Realty Co., 191 S. W. (Mo.) 1. c. 46 and cases cited; 12 R. C. L. Section 43, p. 971; Tyler v. Wright, 164 Mich. 606; Dalby v. Maxfield, 244 Ill. 214; Reese v. Trust Co., 218 Pa. 150; Driscoll v. Driscoll, 143 Cal. 528; Baker v. Baker, 43 Ind. App. 26; Dillivan v. German Savings Bank, 124 N. W. (Ia.) 350.]

In O'Day v. Annex Realty Co., 191 S. W. 1. c. 46, in considering this question, we said:

"Aside, however, from the foregoing potent objection to a single page of this diary being considered as competent evidence we find that the contents of same does not purport to be an admission contrary to the interests of defendants and M. B. O'Reilly. On the contrary, this diary was offered for the express purpose of overturning the constructive trust sought to be established by plaintiff on May 26, 1898, when the quitclaim deed was delivered. It was also offered to show that an entirely different agreement had been made from that claimed by plaintiff, and which was more favorable in its terms to O'Reilly and the defendants. The cases relied upon by respondents hold that the admission of a party, against his interest when made, may, under certain circumstances, be given in evidence, but they have no application to the facts of this case, for the reasons aforesaid. On the contrary, the page of diary offered in evidence must be classed as a self-serving declaration of M. B. O'Reilly and inadmissible for any purpose. [Laclede Land & Improvement Co. v. Goodno, 181

S. W. l. c. 413; Elliott v. Sheppard, 179 Mo. l. c. 390, 78 S. W. 627; Wilcoxson v. Darr, 139 Mo. l. c. 673, 41 S. W. 227; Coombs v. Coombs, 86 Mo. l. c. 178; Manion Blacksmith Co. v. Carreras, 19 Mo. App. 162; Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899.]”

In 12 Ruling Case Law, sec. 43, page 971, the rule of law in respect to this matter, is stated as follows:

“The declarations or admissions of a donor as to the fact of delivery and as to his intention are admissible to support an alleged gift, but not to impeach his gift.”

The above contention is clearly without merit and is overruled.

V. Appellant insists that “the trial court, having permitted one of plaintiff’s witnesses to relate a particular conversation with the deceased, **Explaining Gift.** should have permitted the other witness who was present to give her version of the same conversation.”

The above contention is based upon the testimony of William R. Townsend, who testified, in substance, that in September, 1907, George Townsend, in a conversation with his secretary, said if he collected a certain sum of money from Wyandotte County he would go to Indianapolis, take up thirty-two bonds, purchase eighteen more, and give them to his sister. This testimony was stricken out, and the witness corrected his evidence by stating the following:

“A. I certainly knew they were borrowed bonds.

“The Court: You say you knew? A. He said he wished to return the bonds he had borrowed from his sisters. I think the total was more than that. . . .

“He was very glad that he was able to return to his sisters fifty of the bonds that he had borrowed from them.”

The defendant testified that she did not think William R. Townsend heard the conversation; and that the above conversation, testified to by William R. Town-

send, did not occur. Her counsel then sought to prove by her that George Townsend said he was returning certain bonds to his sister for his own use, so that he might use them in case of necessity. This offer was obtained to as incompetent, because it was a self-serving statement and could not be used to defeat the gift. The other testimony sought to be elicited from her related solely to a self-serving declaration of George Townsend, and under the authorities heretofore quoted from was incompetent and properly excluded. This contention is likewise without merit.

VI. The trial court is charged with error in "excluding the testimony of Mrs. Schaden as to what Mr. Townsend said at the time when he wrote the letter which was dated October 25, 1907." The letter **Hearsay.** referred to is Exhibit 6, set out in the statement. Defendant testified that this letter was written in 1909, and not in October, 1907. She was then asked the question: "Did Mr. Townsend make any statements to you at the time he wrote that letter as to why he was writing that letter?" The testimony sought to be elicited, was purely hearsay, self-serving in character, and clearly incompetent.

VII. The court is charged with error "in striking out certain statements of Mrs. Schaden with **Conclusion.** reference to the writing of the letter dated October 25, 1907."

The question propounded reads as follows: "Q. State to the jury what he [Townsend] did. A. At the time he asked me for the letterhead, he asked me to get the diary in an old suitcase and he turned back to see when he was in Indianapolis and wrote the letter to correspond with the date."

Counsel for plaintiff objected to that portion of the above answer, as to why he turned back to the diary, as being a conclusion of the witness. The objection was sustained, and properly so. She then testified fully as to what she saw him do with the diary.

The above contention is devoid of merit and is overruled.

VIII. Appellant contends, that the "court erred in giving instructions 'A' and 'B' of its own motion."

These instructions read as follows:

"A. You are instructed that if you find that George Townsend made a gift as defined in other instructions herein of these bonds to his sister Cornelia, on or about October 26, 1907, then her title to or ownership of said bonds at said time cannot be affected by the subsequent possession of the same by George Townsend nor by his using or selling them.

"B. The court instructs the jury, if you believe from all the evidence that George Townsend made a gift as defined in other instructions herein, of forty Water bonds to his sister Cornelia in 1907, and thereafter on or about the month of March, 1908, borrowed said bonds from said sister, and that he sold said bonds and returned to her in January, 1910, thirty-two Citizens Street Railway bonds of the par value of \$1000 each, instead of thirty-two of those he sold, then the plaintiff is entitled to recover from the defendant in the amount of \$1000 for each of the eight bonds not so replaced."

We are of the opinion that the above instructions properly declare the law in a case of this character, and that they presented both sides of the controversy fairly to the jury. The case of *Foley v. Harrison*, 233 Mo. 460, so strongly relied on by appellant, involved the question of *donatio mortis causa*. The court in that case was not discussing instructions, but the law as applied to that kind of an action. In considering the merits of the case, Woodson, J., on page 582, said: "It is conceded by all the authorities, that a greater weight of evidence is required in this class of cases than is required in ordinary cases, in order to receive the sanction and approval of the courts of the country. This must be true in the very nature of the transaction,

and is based upon a wise public policy." We have no fault to find with the able and exhaustive opinion in the Foley case, as applied to the facts there considered, but do not deem the rule enunciated therein applicable to the facts under consideration here. The above instructions, are, in our opinion, in line with the principles of law declared in the cases cited under Proposition III, *supra*. The question now raised in reference to said instructions "A" and "B" appears to have been an afterthought, as defendant, in her instructions five and six, refused by the court, presented no such issue.

The foregoing contention of appellant, is not well founded and is accordingly overruled.

IX. It is insisted by defendant that "the five-year Statute of Limitations is a bar to plaintiff's claim." There is no merit in this contention. The evidence shows that plaintiff and her brother, George Townsend, had mutual dealings in regard to these bonds up to and including 1911. This suit was brought January 8, 1914, as an action in *assumpsit*, for the value of the bonds loaned to George Townsend by plaintiff and which were used by him in his business. [Henderson v. Koenig, 192 Mo. l. c. 709 and cases cited.] There was no testimony adduced at the trial which would have warranted the jury in finding that the five-year Statute of Limitations had barred plaintiff's right of recovery.

X. We have carefully examined all the questions presented for our consideration. Some of the authorities cited by appellant upon the subject of gift, relate to testamentary disposition and are not in point. In many of the cases cited upon the subject of delivery, there was no substantial evidence of delivery shown. In still other cases relied on the donors expressly reserved title, and dominion.

We are satisfied with the legal principles heretofore considered, which should govern this case. Find-

Lige v. Railroad.

ing no errors in the record of which defendant can legally complain, we affirm the judgment.

PER CURIAM.—The foregoing opinion of RAILEY, C., is adopted as the opinion of the court. All of the judges concur, except *Woodson, J.*, not sitting; *Bond, P. J.*, concurs in result.

FRANK LIGE v. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY, Appellant.

Division One, July 5, 1918.

1. **INTOXICATED PASSENGER: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 438 (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicating liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the names of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitution.
2. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The act of 1909, page 438 (Secs. 3710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United

Lige v. Railroad.

States which prohibit the enforcement of any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States.

3. ———: ———: **Common Law Right of Action Nevertheless.** Notwithstanding the fact that the statute upon which plaintiff grounds his cause of action for personal injuries is unconstitutional, yet if the petition, independent of that plea, states a good cause of action at common law, a demurrer to the evidence should not be sustained, if it warrants a submission of the case to the jury upon the common-law theory.
4. ———: **Injury to Fellow Passenger: Liability of Carrier.** A common carrier is bound to exercise the utmost practicable care for the safety of its passengers, to safely transport them, and to protect them while in transit from violence and insults from all persons on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damages therefor; but the duty does not amount to an absolute guaranty that a passenger will be transported with absolute safety or that he will not be insulted or injured by an intoxicated fellow-passenger. The rule means that the conductor and other trainmen must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for injuries inflicted by one passenger upon another, if in the exercise of that degree of care the assault or injury is not to be foreseen.
5. ———: ———: ———: **Sudden and Unexpected Assault.** A common carrier is not liable in damages to a passenger for injuries resulting from a sudden assault by another intoxicated passenger, who, without any previous threat or verbal altercation, who was not previously boisterous or insulting in his talk or conduct and who gave no evidence that he was intoxicated except that he was talking generally and having a jolly good-time, suddenly seized an iron wrench and struck on the head the other passenger, who was a total stranger to him.

Appeal from Harrison Circuit Court.—*Hon. G. W. Wanamaker*, Judge.

REVERSED.

H. J. Nelson, Barlow, Barlow & Kautz, J. A. Lydick and M. G. Roberts for appellant.

(1) The instruction in the nature of a demurrer to the evidence should have been given for the reason that the act of June 8, 1909 (Laws 1909, p. 438; Secs.

Lige v. Railroad.

4710, 4711, 4712, R. S. 1909), upon which the plaintiff specifically in his petition predicates a recovery, is void and unconstitutional for: (a) The act is an unreasonable and arbitrary exercise of power, in violation of the due-process clause of the Missouri Constitution (Sec. 30, art. 2) and the Fourteenth Amendment to the Federal Constitution, in that it requires a conductor of a train to report to the prosecuting attorney every passenger who is intoxicated or who takes a drink of intoxicating liquor, or who exhibits intoxicating liquor on his train, together with the names of three witnesses who have personal knowledge, and this he is required to do without regard to the question whether the conductor had any knowledge of the offense. (b) The statute is further invalid for the reason that it provides that a person may become intoxicated, or drink intoxicating liquor, or exhibit intoxicating liquor, on dining cars and private cars while penalizing the same offense in other cars on the same train, thus granting special or exclusive rights, privileges and immunities in violation of Section 53 of Article 4 of the Missouri Constitution and Fourteenth Amendment of the Constitution of the United States prohibiting any State from passing any law which abridges the privileges and immunities of citizens of the United States. *State ex rel. Rolston v. Chicago, B. & Q. R. Co.*, 246 Mo. 515; *Embree v. Kansas City & Liberty Blvd. District*, 257 Mo. 616. (2) The instruction in the nature of a demurrer offered by the defendant at the close of plaintiff's evidence and again at the close of all the evidence, should have been given for: A sudden and unanticipated assault by one passenger upon another does not render the carrier liable unless it is shown that its employees knew or could have known in time to prevent the assault from the wrongdoer's act and conduct that he was contemplating injury to his fellow passengers. *Galveston, H. & S. A. R. Co. v. Long*, 36 S. W. 485; *Putnam v. Railroad*, 55 N. Y. 108; *Brehony v. Pottsville Union Traction Co.*, 218 Pa. 123; *Pittsburg, C. C. & St.*

L. Railroad Co. v. Vandyne, 57 Ind. 576; *Milliman v. New York C. & H. Railroad Co.*, 66 N. Y. 643; 10 *Corpus Juris*, 905; 3 *Thompson on Negligence*, sec. 3093, p. 550, sec. 3087, p. 545; *Thompson v. Manhattan Ry. Co.*, 75 Hun, 548, 27 N. Y. Supp. 608; *Felton v. Chicago, R. I. & P. Ry. Co.*, 69 Iowa, 580, 29 N. W. 618; *Spohn v. Mo. Pac. Ry. Co.*, 87 Mo. 74; *Woas v. St. Louis Transit Co.*, 198 Mo. 677.

J. C. Wilson and Garland Wilson for respondent.

(1) The Act June 8, 1909 (Laws 1909, p. 438), the same being Secs. 4710, 4711, 4712, R. S. 1909, is constitutional. *Jones v. Yore*, 142 Mo. 38; *Simon v. Craft*, 182 U. S. 427; *Moore v. Missouri*, 159 U. S. 673; *State v. Miller*, 209 Mo. 389; *Giozza v. Tiernan*, 148 U. S. 657; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445; *Gladson v. Minnesota*, 166 U. S. 427; *State ex rel. Rolston v. Railroad*, 246 Mo. 512; *State v. Swagerty*, 203 Mo. 523; *Brady v. Mattern*, 125 Iowa, 163; *Embree v. K. C. & L. B. D.*, 257 Mo. 593; *Corrigan v. Kansas City*, 211 Mo. 608. (2) A carrier who permits a drunken man to become and remain a passenger on its train is liable for damages caused by an unprovoked assault upon another passenger. R. S. 1909, sec. 4710, 4711, 4712; *Spohn v. Railroad Co.*, 101 Mo. 452; *Westcott v. Seattle Railway Co.*, 41 Wash. 619; *Jackson v. Boston El. Railway Co.*, 217 Mass. 515. (3) Plaintiff's instructions that the defendant was bound to exercise that high degree of care that a careful railroad would employ in conveying its passengers safely, under the circumstances, announces the correct rule. *Hudsenhamp v. Citizens' Railway Co.*, 37 Mo. 537; *Lemon v. Chanslor*, 68 Mo. 340; *Dougherty v. Missouri Railway Co.*, 81 Mo. 325; *Furnish v. Mo. Pac. Ry. Co.*, 102 Mo. 438; *Clark v. Chicago & A. Ry. Co.*, 127 Mo. 197; *Porch v. Southern Electric Railway Co.*, 76 Mo. App. 601; *Choquette v. Southern Electric Railway Co.*, 80 Mo. App. 515; *Young v. Mo. Pac. Ry. Co.*, 93 Mo. App. 267; *Spohn v. Mo. Pac. Ry.*

Lige v. Railroad.

Co., 101 Mo. 417; Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1; Gardner v. Metropolitan St. Ry. Co., 223 Mo. 389; Stauffer v. Met. St. Ry. Co., 243 Mo. 305; Powell v. Union Pac. Railway Co., 255 Mo. 420; Wentz v. C. B. & Q. Railway Co., 259 Mo. 450.

WOODSON, J.—This is a suit brought by the plaintiff against the defendant, in the circuit court of Harrison County, to recover damages for personal injuries sustained by him while a passenger upon one of its trains, by being assaulted by Bert Burke, another passenger thereon, while in a drunken or intoxicated condition. The plaintiff recovered judgment for one thousand dollars, and the defendant timely and properly appealed the cause to this court.

Omitting unessentials the petition reads:

“Plaintiff further states that the defendant wholly disregarding its duties towards its said passengers, and especially towards this plaintiff, and while plaintiff was so riding on the said ticket purchased as aforesaid, negligently and carelessly by and through its servants and agents, to-wit, its conductor and brakeman in charge of said train, permitted one Bert Burke, while drunk and in a condition dangerous to the property and lives of its passengers, to enter its said train at St. Joseph, Missouri, and to become a passenger on the same train on which defendant was carrying this plaintiff to Blythedale, Missouri, as aforesaid. And that the defendant by its said conductor and brakemen negligently and carelessly permitted and suffered said Bert Burke, through the negligence and carelessness of its servants, to remain on its train as a passenger, while said Burke was drunk and in a condition dangerous to the property and lives of defendant’s said passengers traveling on said train as aforesaid—all of which was in violation of Article 7, Chapter 36, Revised Statutes of Missouri, as aforesaid.

“Plaintiff further states that while so traveling as a passenger as aforesaid on the railroad of the defendant as aforesaid, from St. Joseph, Missouri, to Blythe-

dale, in Harrison County, Missouri, on said 30th day of November, 1912, at a point on defendant's railroad between Bethany, Missouri, and Ridgeway, Missouri, and without any fault on the part of this plaintiff, the said Bert Burke aforesaid, while drunk and in a condition dangerous to the lives and property of the other passengers on said train, while he was being carried by defendant, who had knowledge of his condition, unlawfully, wrongfully, and feloniously assaulted this plaintiff by striking him upon the head with a large iron T. wrench or stove key, giving to him a dangerous wound, thereby wounding, injuring and permanently disfiguring the plaintiff and causing him great pain, suffering and humiliation."

Then follows an allegation as to the extent of the injuries; that they were caused by the wrongful acts of Burke and said negligence of the defendant, and a prayer for judgment for \$2500. The statutes referred to in the petition read as follows:

"Section 1. It shall be unlawful for any person in this State to enter a passenger train or car kept for the conveying of passengers, intoxicated, or drink intoxicating liquor on said passenger trains or car, or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, and every person or persons so doing shall be guilty of a misdemeanor and fined not less than five dollars or more than twenty-five dollars for said offense.

"Section 2. It shall be the duty of the conductor on every passenger train or car in this State to report to the prosecuting attorney of the counties in which any such offense is committed, together with the name of the person so intoxicated, the date thereof, and the names of three witnesses who have personal knowledge of the commission of said offense, and upon failure to do so within five days thereafter he shall be guilty of a misdemeanor and fined for each and every offense not less than five dollars or more than twenty-five dollars.

Lige v. Railroad.

"Section 3. Provided nothing in this act shall be so construed to apply to dining cars or private cars."

The answer of defendant was as follows:

"Now comes the defendant in the above entitled cause and denies the allegations in plaintiff's petition contained.

"Defendant, further answering, states that Sections 4710, 4711 and 4712 of Article 7 of Chapter 36 of the Revised Statutes of Missouri for the year 1909, to which law reference is made in plaintiff's petition, are unconstitutional, invalid and of no effect for the reason that said law exempts from its provisions dining cars and private cars, and for the further reason that said law, when passed during the session of 1909 by the Legislature of Missouri (Laws 1909, p. 438) did not have the subject-matter clearly expressed in the title as required by Section 28 of Article 4 of the Constitution of Missouri; and for the further reason that said alleged law is in violation of the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, and denies to persons within the jurisdiction of the State of Missouri the equal protection of the laws; and for the further reason that the said alleged law is in violation of Section 53 of Article 4 of the Constitution of Missouri; and for the further reason that the said alleged law is in violation of Section 30 of Article 2 of the Constitution of Missouri; and for the further reason that said alleged law is in violation of Section 23 of Article 2 of the Constitution of Missouri.

"Wherefore defendant having fully answered asks to be discharged with its costs in this behalf expended."

The following facts are undisputed:

Frank Lige, the plaintiff, and Bert Burke, who assaulted him, were perfect strangers and were passengers on defendant's train from St. Joseph, Missouri, to points in Harrison County, on November 30, 1912. Both of them sat in the smoking car of the train. The train left St. Joseph about 10 a. m. It passed through the towns of Crosby, Helena, Union Star, King City,

Ford City, Darlington, Albany, New Hamton, Bowman and Bethany. Somewhere between Bethany and Ridgeway, Burke picked up an iron T wrench near a stove in the smoking car and struck Lige on the head, causing a painful wound. The assault was committed without any warning whatever, without any prior threat or any previous verbal altercation.

Several witnesses for the plaintiff testified that Burke was under the influence of liquor while on the train. Some described him as being intoxicated, others as being drunk, and still others as being under the influence of liquor. One said: "I thought he was intoxicated." Others testified that "he was under the influence of liquor;" "he was a little bit intoxicated;" "well, think he had some whisky on him;" "I would judge he was under the influence of liquor;" "I would call him intoxicated;" "he looked to me like he had been on a spree;" "I thought he was pretty drunk;" "he was feeling pretty good, I thought;" "he looked a little full to me;" "he looked like he was intoxicated;" "my opinion was at the time he was rather under the influence of liquor to some extent."

In short, the testimony of all the witnesses, including the conductor and brakeman on the train, was that Burke was in an intoxicated condition; the attention of the witnesses, some of them strangers to Burke, were attracted to him by his "joshing" and talking and intoxicated appearance. The evidence also tended to show that Burke was intoxicated when he boarded the train at St. Joseph, with his shirt slightly torn, and that his condition appeared to some of the witnesses to grow worse as the train moved on.

That independant of Burke's intoxication, joshing and talking as previously mentioned, Burke was guilty of no improper conduct whatever while in the train until he suddenly and without cause assaulted the plaintiff as before stated; he did not know, nor had he addressed or threatened plaintiff prior to that time, but was conversing pleasantly with other parties and having a jolly time.

I. The first contention advanced by counsel for the defendant is that the trial court erred in refusing the demurrer asked by them to the plaintiff's evidence. This contention is divided by counsel into two subdivisions and each discussed separately upon wholly different grounds. The first contends that the act of the Legislature mentioned in the pleadings is violative of Section 30 of Article 2 of the Constitution of Missouri and Section 1 of the 14th Amendment of the Constitution of the United States, known as the due-process clauses respectively thereof, in that it is unreasonable and arbitrary in requiring a conductor of a train to report to the prosecuting attorney every person who is intoxicated or who takes a drink of intoxicating liquor, or who exhibits intoxicating liquor on his train, together with the names of three witnesses who have personal knowledge of the facts; and the second contention is that said act of the Legislature violates Section 53 of Article 4 of the Constitution of Missouri, and the 14th Amendment of the Constitution of the United States, which respectively prohibit the enforcement of any law of the State denying equal rights, or abridges the privileges and immunities of the citizens of the United States.

We will dispose of these propositions in the order stated.

Attending to the first: No authority is cited in support of this contention, and in our opinion for the reason that none exists, and if the act is given a reasonable construction, which is one of the fundamental rules of statutory construction, no other authority will be necessary. The evident intention of the Legislature was to impose a duty upon the conductor to report to the prosecuting attorney all parties who to his knowledge had been intoxicated or drinking or exhibiting intoxicating liquors on his train, for the purpose of having him punished for being guilty of such conduct upon the cars of a common carrier, in the presence of fellow passengers and thereby deter all persons from

indulging in such misconduct on all such trains. We state this for the reason that the accomplishment of no other object seems to have been in the mind of the Legislature; had it also been the design to afford *immediate* protection to the passengers from the abuse, insults and assaults of such persons, then it would seem that the Legislature would have used some appropriate language requiring the conductor to prevent such persons entering the train and to remove all such therefrom and make the company liable in damages for all injuries sustained by any passenger by reason of such misconduct on the part of any such person. But an examination of the act which we have copied in full in the statement of the case will reveal the fact that no such idea is expressed by the language used therein, nor is reasonably inferable therefrom, but the design, as previously stated, was not to affect the company, but to make it unlawful for any intoxicated person to enter a passenger train, or to drink or exhibit intoxicating liquors thereon, and thereby deter them from the commission of all such crimes in the future. The duty of the company to prevent such persons from entering its trains, remove them therefrom and protect its passengers from their insults and injury is well defined and regulated by the common law, which we suppose had much to do with influencing the Legislature in the passage of the act in the form we find it. This common law duty of the carrier will receive careful consideration hereafter in a more appropriate place.

For the reason stated, the act is not applicable to defendant company, but to the conductor and intoxicated passenger, etc., only, and therefore the defendant is in no position to question the constitutionality of the act.

But, assuming that we are mistaken in the foregoing views, and assuming that the act is applicable to the defendant, then the second contention mentioned would be of a more serious character. Section 1 of the act in question makes it unlawful for any person in this State to enter a passenger train or car kept for the conveyance of passengers while intoxicated, etc., and im-

Lige v. Railroad.

poses a fine of not less than five dollars nor more than twenty-five dollars for said offense, while Section 3 thereof provides that nothing therein contained shall be so construed as to apply to dining cars or private cars. In other words, that section makes it unlawful for any person to go upon a passenger train or enter any car thereof while intoxicated or to drink intoxicating liquors or exhibit the same while thereon, excepting therefrom dining and private cars.

This act in our opinion is clearly unconstitutional, violative of both the State and United States Constitutional provisions before mentioned, in that there is no substantial and reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars upon the other; the primary purpose of the first named is for the occupancy by the public while traveling thereon and incidentally they are constantly used by many for eating and sleeping purposes also; the second are chiefly designed for traveling and sleeping purposes, yet they are also constantly used by many for eating places; the diner is intended for eating places for all aboard the train who desire to avail themselves of the privilege, yet they are incidentally used for travel while the passengers are dining therein, and the private car is designed for all of said purposes, for those aboard them. But after all, all of them, with the engine and tender, constitute the means of transportation of the traveling public, the paramount object of their creation, and while all of them serve a useful purpose in accomplishing that end, yet some of them in addition contribute to the pleasure and comfort of the passengers while en route, and even to their necessities while on through trains on long journeys, but, nevertheless, each and all of them constitute a link in the train of transportation and are so closely commingled and inseparably connected in their common purpose that there can be no reasonable separation or classification made of them without disturbing the comforts and necessities of all on board the train, and subjecting all to the insults and injuries which the act

was designed to prohibit. Under these conditions the law would not and could not operate equally and alike upon all similarly situated. That being true the act is clearly unconstitutional, as previously stated and as shown by the following authorities: State ex rel. v. Chicago, Burlington & Quincy Railroad Co., 246 Mo. 512, l. c. 514 and 515; Embree v. Kansas City & Liberty Blvd. Road District, 257 Mo. 593, l. c. 616.

But notwithstanding the unconstitutionality of this act for the reasons stated, yet the demurrer to plaintiffs evidence could not be properly sustained
Common Law
Plea: Demurrer. on that ground only because the petition, independent of the plea of the act mentioned, stated a good cause of action at common law and the cause should have been submitted to the jury upon that theory of the case, if the evidence introduced upon that branch of the case warranted a submission, which we will consider in the next paragraph.

II. Regarding the common law cause of action: The petition in substance stated that the defendant was a common carrier of passengers; that the plaintiff was a passenger upon one of defendant's trains going from St. Joseph, Missouri, to Ridgeway; that one
Injury to Passenger. Burke was also a passenger upon said train and was riding in the same car with plaintiff between said points; that at the time said Burke entered said car he was intoxicated and remained so during the time the train ran from St. Joseph to Ridgeway, which fact was well known to the agents and servants of defendant in charge of said train and car, and that they knew that said Burke was liable to insult and injure its passengers on said train and especially the plaintiff; that it was the duty of the defendant to use the highest degree of care to safely transport plaintiff between said points and to protect him from insults and injury at the hands of other passengers on the train, and that in violation of said duty the defendant through its said agents and servants negligently and carelessly permitted said Burke, without cause or excuse,

Lige v. Railroad.

to assault and strike plaintiff with an iron rod over the head, and thereby greatly injure him, etc.

The plaintiff's evidence tended to show the truthfulness of all of said allegations except as hereinafter stated; and all the evidence for both parties showed that Burke prior to the assault complained of was not boisterous or insulting in his talk and conduct, but was talking generally and having a jolly good-time, disturbing no one, until the train neared Ridgeway, when he suddenly and without warning picked up the poker and struck the plaintiff with it. The evidence also failed to show that the conduct of Burke prior to the assault was such as to warn the conductor in charge of the train or any one else on the car that he was in a bad humor or that he intended to insult or to do violence to any one.

Upon this state of the record counsel for the defendant contend that the court erred in refusing the defendant's demurrer to the plaintiff's evidence on the common-law theory of the case, and state their reasons therefor in this language:

"A sudden and unanticipated assault by one passenger upon another does not render the carrier liable unless it is shown that its employees knew or could have known in time to prevent the assault from the wrongdoer's act and conduct that he was contemplating injury to his fellow passengers. In this case, it appears beyond any question that Burke made no threats, used no profanity, was not abusive to anyone, had no trouble, and conducted himself properly until he suddenly picked up the wrench and quickly assaulted the plaintiff. Under such circumstances the carrier is not liable. The fact that he was under the influence of liquor or even intoxicated, but otherwise not guilty of any misbehavior, will not subject a carrier to liability for an injury caused by his act in assaulting a fellow passenger."

The following authorities are cited in support of this contention: *Galveston H. & S. A. Ry. Co. v. Long*, 36 S. W. (Tex.) 485; *Putnam v. Railroad*, 55 N. Y. 108;

Lige v. Railroad.

Brehony v. Pottsville Union Traction Co., 218 Pa. 123; *Pittsburgh, C. C. & St. L. Railroad Co. v. Vandyne*, 57 Ind. 576; *Milliman v. New York C. & H. R. Railroad Co.*, 66 N. Y. 642; 10 *Corpus Juris*, 905; 3 *Thompson on Negligence*, sec. 3093, p. 550, sec. 3087, p. 545; *Thomson v. Manhattan Ry. Co.*, 75 Hun, 548, 27 N. Y. Supp. 608; *Mills v. Atlantic C. L. R. Co.*, 90 S. E. (N. C.) 221; *Felton v. Chicago, R. I. & P. Ry. Co.*, 69 Iowa, 577, 29 N. W. 618; *Spohn v. Mo. Pac. Ry. Co.*, 87 Mo. 74; *Woas v. St. Louis Transit Co.*, 198 Mo. 664, l. c. 677.

It is no longer a debatable question in this country that a common carrier of passengers for hire is bound to exercise the utmost practicable care, to safely transport its passengers and to protect them while in transit from insults and violence at the hands of all on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damage therefor; but that duty does not amount to an absolute guaranty that a passenger will be transported absolutely safely to his destination or that he will not be insulted or injured by a fellow-passenger while in transit. It simply means that the conductor and those in charge of the train must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for an injury to a passenger caused by an impending danger, if not discernible by the exercise of that degree of care.

In the case at bar Burke had neither said nor done anything indicating to an ordinarily prudent person engaged in that class of business that he had any evil design against any one, or that he intended to do violence to anyone, much less the plaintiff, whom he did not know and had never met.

The conductor and all of the passengers who testified stated that they did not see or hear Burke say or do anything prior to the assault that led them to believe that he intended to strike the plaintiff or do violence to any one. Even the sheriff of the county, who was a passenger on the same car with plaintiff and

Lige v. Railroad.

whose duty it was to preserve the peace, did not see or hear the latter do or say anything to cause him to apprehend any trouble whatever on the part of Burke.

In discussing a similar case the Supreme Court of Pennsylvania in the case of *Brehony v. Pottsville Union Transit Co.*, 218 Pa. St. 123, clearly announced the facts and law of a similar case, which are substantially stated in the syllabus of the case, as follows:

"In an action by a woman passenger against a street railway company to recover damages for personal injuries sustained as the result of a kick of an intoxicated passenger, where the only negligence alleged was the action of the conductor in admitting into the car the man who inflicted the injuries, when visibly intoxicated, it is reversible error to submit the case to the jury where the evidence shows that there was nothing in the appearance or the conduct of the man as he entered the car to attract attention, or excite suspicion, and that he did not become violent until an altercation arose between him and the conductor as to the fare."

In the case of *Galveston, Houston, San Antonio Railway Co. v. Long*, 36 S. W. 485, where a passenger on a railway train, who was somewhat intoxicated and who passed a number of times through the train, apparently looking for some one, without offense toward any one, accidentally stumbled over some baggage, and a revolver fell from his pocket, which was discharged and wounded another passenger, the Civil Court of Appeals of Texas held that the defendant had no reason to anticipate such an accident and therefore was not liable for the injury sustained by the plaintiff.

In the case of *Putnam v. Broadway & Seventeenth Avenue Railroad Co.*, 55 N. Y. 108, the plaintiff's intestate, with two ladies, took passage upon one of defendant's cars. Shortly thereafter one Foster, who was intoxicated, got on the front platform of the car and after riding there a short distance opened the car door and insulted and annoyed the ladies. Putnam asked the conductor to make him be quiet; the conductor directed him to sit down and behave himself. He sat

down near Putnam and after the conductor returned to the rear platform he addressed to the former abusive and threatening language, in a low tone, not audible to the conductor. After remaining a short time he returned to the front platform where he remained quietly until Putnam left the car, when he jumped therefrom with the car hook, and as Putnam was assisting the ladies to alight, Foster struck him with the hook, causing death. In an action against the company to recover damages the court held that there was no evidence of neglect of duty on the part of the conductor, or want of proper care and vigilance on the part of the servants of defendant; certainly none connected with the attack upon Putnam, or to which it could be legally or logically traced, and that defendant was not liable.

In the case of *Pittsburg, Cincinnati and St. Louis Railway Co. v. Vandyne*, 57 Ind. 576, the Supreme Court of Indiana held that slight intoxication of the defendant, such as would not seriously affect the safety of the passengers aboard the train, would not justify a railroad company in refusing to receive and carry him.

In the case of *Milliman v. New York Central and Hudson River Railroad Co.*, 66 N. Y. 642, the Court of Appeals held that the fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him, as a passenger, due care.

On page 905 of 10 Corpus Juris, it is said:

“It is the duty of the carrier’s employees to protect passengers from the acts or conduct of an intoxicated fellow passenger, and, where there is reason to apprehend injury or annoyance from him to other passengers, they should eject him from the train or other vehicle, or require him to remain seated and behave himself; and, where by reason of the employees’ negligent failure to afford such protection a passenger is injured by an intoxicated fellow passenger, the carrier is liable. But it is not liable where there has been no reasonable opportunity to discover such passenger’s condition and intent; and failure to eject a passenger merely because

Lige v. Railroad.

he is drunk, if otherwise well behaved, will not alone subject a carrier to liability for an injury caused by his acts or conduct."

And Judge THOMPSON in the discussion of this question in volume 3, page 545, section 3089, of his work on Negligence says:

"If the conduct of a railway passenger is such as to excite reasonable apprehensions that his presence will result in injury or annoyance to other passengers, it is the right and duty of the conductor to expel him, without waiting for any overt act of violence. Nor is it enough for a railway carrier to protect his passengers against actual violence from other passengers, but such a carrier is liable in damages, even in favor of passengers riding in a second-class car, for suffering them to be subjected to annoyances, not necessarily or ordinarily incident to such travel, such as hearing rough, profane and obscene language, and witnessing acts of violence and drunkenness, which the company, by the exercise of proper care and due regard for the welfare of its passengers, could prevent. For stronger reasons, such a carrier is liable in damages to a peaceable passenger who is injured in consequence of a quarrel between drunken passengers on the carrier's vehicle, where the carrier, in the exercise of the degree of care imposed upon him by the law, might have prevented the injury. But it was well held that a railway carrier was not liable to a passenger for abuse and violence from an intoxicated fellow-passenger who demanded from him money which he claimed was due him, and who threatened to take his life unless he paid it, where the conductor quieted the person intoxicated, and remained between the two during a subsequent difficulty, and delivered the intoxicated person to a policeman on reaching the next station."

The same general rule of law is announced in all of the other cases cited by counsel for the defendant; while upon the other hand, counsel for plaintiff have cited no case involving an injury to a passenger inflicted by an intoxicated passenger which holds the carrier

liable therefor, but all of them are based upon the broad general rule that the carrier is liable to a passenger for injuries inflicted by any cause if it could have been prevented by the exercise of the highest degree of care usually exercised by very cautious persons engaged in similar business, and cite in support thereof the following cases: *Spohn v. Missouri Pacific Railway Co.*, 101 Mo. 417, l. c. 452; *Westcott v. Seattle, Renton & Southern Railway Co.*, 41 Wash. 618; *Jackson v. Boston Elevated Railway Co.*, 217 Mass. 515.

There is no doubt about the correctness of that general rule, but that rule does not absolutely bar an intoxicated man of his right to ride upon the railroads of the county, nor authorize a carrier of passengers to exclude him its trains without his conduct is such as to cause the agents and servants of the company in charge thereof to apprehend danger from him to his fellow passengers.

We are, therefore, clearly of the opinion that the court erred in refusing defendant's demurrer to the plaintiff's evidence.

III. The views stated in paragraphs one and two of this opinion render it unnecessary to pass upon the other legal propositions presented by the record and briefs of counsel.

The judgment of the trial court, for the reasons stated, is reversed. All concur; *Bond, P. J.*, in paragraph two and the result.

BLAIR, J.—(concurring). It is unnecessary to pass upon the constitutionality of the Act of 1909. Further, I am far from convinced that the Act is unconstitutional. With these qualifications I concur in the opinion.

MINA M. OAKLEY v. ERNEST E. RICHARDS et al.,
Appellants.

Division One, July 5, 1918.

1. **MOVING PICTURE THEATER: Duty of Owner to Patrons.** It is the duty of the owners and operators of a moving-picture theater to see that the place to which they invite their patrons is

Oakley v. Richards.

reasonably safe for use for the purposes for which it was designed.

2. ———: **Step-Off in Floor: Absence of Light.** It is a matter of common knowledge that a four-inch depression in a floor is sufficient to cause one to fall who, in the absence of light and knowledge of the depression, steps into or upon the edge of it. So that where the floor upon which were the seats of the moving picture theater was four inches above the aisle, which fact plaintiff did not know, and there was not sufficient light to enable her to see the depression, which brought about her fall, the concurrence of the two constituted negligence, and the jury was warranted in finding that her fall was due to her inability to see the step-off on account of the darkness.
3. ———: ———: **Contributory Negligence.** Patrons having been invited to enter and leave the moving-picture theater at will during performances, it cannot be said, as a matter of law, that a patron, seeing others using the aisle, which was four inches below the floor on which the seats rested, was guilty of contributory negligence in failing, in the absence of knowledge of the step-off and of sufficient light to enable her to see it, to apprehend that the usual path of exit contained an unsafe place or pitfall. The question was one for the jury.
4. ———: **Amending Petition After Proof: Changing Defense: Permissive Ordinance.** Where the petition charged that a designated ordinance prohibited inequalities in the floor levels of a theater and a violation thereof, and the answer set up another ordinance containing a like prohibition but subject to exception on written permission of named officials and contained an averment of such permission, and defendant's own evidence totally failed to show any such permission, it was not error to permit plaintiff, after the evidence was in, to amend her petition by interlineation to conform to the proof by adding a charge that the ordinance pleaded by defendant had been violated. The amendment to the pleading did not change the defense, and was right.
5. ———: **Floor Level: Inequalities Upon Permission: Inspection.** Where the ordinance declared that "no steps shall be permitted in any aisle or in any part of the auditorium floor" of a theater "except by written permission" of named officials, permission cannot be implied from a mere inspection by such officials.
6. ———: **Validity of Ordinance: Steps in Aisle: Permission of Officials.** An ordinance prohibiting steps in the aisle or on any part of the auditorium floor of a moving-picture theater "except by written permission" of designated officials does not vest an arbitrary power in said officials and is not for that reason invalid. In case a city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from a designated official; and a city may lawfully prohibit absolutely inequalities in floor levels in darkened theaters, and matters of de-

Oakley v. Richards.

tail in enforcing ordinances otherwise valid may be left to designated officials.

7. **DEMURRER: Refusal Of Leave to File.** It was not error to refuse leave to defendant to file a demurrer to the petition if the filing of it could not have availed him anything.
8. **MOTION TO ELECT.** A refusal to permit defendant leave to file a motion to compel plaintiff to elect between certain causes of action stated in her petition is not error, if she announced that she elected to stand on certain allegations, and the instructions were based on them, and another was given withdrawing all the others from the jury.
9. **PICTURE THEATER: Step-Off in Aisle: Assumption of Risks.** Where the petition charged that the aisle of a moving-picture theater was four inches lower than that part of the floor on which the seats rested, that such step-off was in violation of a designated ordinance, that such construction was negligence, that plaintiff had no knowledge of such step-off and that there was not sufficient light to enable her to see it, an instruction on the assumption of risks which ignores such allegations is properly refused.
10. ———: ———: **Custom: Contrary to Ordinance.** Custom is no defense to a violation of positive law. Where plaintiff was injured by falling as she attempted to leave her seat in a moving-picture theater, whose aisle was four inches below the auditorium floor, and which construction was in violation of a city ordinance. It was not error to instruct the jury that the fact that the owners of other theaters permitted similar inequalities in the floor constituted no defense.
11. ———: ———: ———: **Proof.** Evidence that about one out of ten theaters in the city had steps from the auditorium floor to the aisle does not prove a customary construction.
12. **JUROR: Impartiality.** Where the talesman testified that his business relations with defendants were such that they might affect his verdict, that he preferred not to sit, that he felt embarrassed to sit as a juror against them, but that he would endeavor to do his duty and would exercise his judgment in returning a verdict according to the law and the evidence, the court did not act arbitrarily in rejecting him.
13. **THEATERS: Difference in Floor Levels: Practicable Construction: Expert Testimony.** It was not error to permit an expert to testify that it was practicable to overcome differences in floor levels in theaters by gradients and inclined planes. It cannot be said as a matter of law that such methods of construction are so practicable that a jury are as capable of drawing correct conclusions on the subject as is an expert.

Oakley v. Richards.

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney*, Judge.

AFFIRMED.

Park & Brown for appellants.

(1) The court erred in not taking the case from the jury at the end of plaintiff's evidence. (a) There was no common-law negligence proved. *Peck v. Amusement Co.*, 195 S. W. 1033; *Ware v. Evangelical Society*, 181 Mass. 285; *Bell v. Bank*, 28 App. D. C. 580; *Hoyt v. Woodbury*, 200 Mass. 343; *Lord v. Dry Goods Co.*, 205 Mass. 1. (b) The seats and lights were arranged in the customary manner. Latest devices and methods are not required. *Peck v. Amusement Co.*, *supra*; *Brands v. Car Co.*, 213 Mo. 708; *Chrismer v. Telephone Co.*, 194 Mo. 208; *Bohn v. Railway*, 106 Mo. 434; *Smith v. Railroad*, 69 Mo. 40; *Dunning v. Jacobs*, 36 N. Y. Supp. 453. (c) The risk was assumed by plaintiff. *Pointer v. Mountain Ry. Cons. Co.*, 209 Mo. 127; *Peck v. Amusement Co.*, 195 S. W. 1033; *Lumsden v. Railroad*, 114 N. Y. Supp. 421.

(2) The court erred in not taking the case from the jury at the end of all of the testimony and in not instructing the jury to find for defendants. (a) There was no common law negligence proved. (b) Ordinance 7667 was complied with. "Written Permission" means merely assent, or acquiescence with knowledge of the facts, evidenced by writing. *Warberton v. Woods*, 6 Mo. 12; *Cowley v. People*, 83 N. Y. 471, 38 Am. Rep. 464; *McHenry v. Winston*, 105 Ky. 310, 49 S. W. 4; *Gregory v. United States*, 10 Fed. Cas. 1198, 17 Blatchf. 325; *State v. Abrahams*, 6 Iowa, 122, 71 Am. Dec. 399; *United States v. Bridge Co.*, 88 Fed. 893. Municipal license need not be in writing. *Boston v. Shaffer*, 9 Pick (Mass.) 415; 2 Dillon on Mun. Corp. (5 Ed.), sec. 561n. A written license is merely evidence of the permission and if permission has in fact been given, absence of writing is immaterial, if the applicant has done everything in his power and has been treated

as the holder of a license. *Prather v. People*, 85 Ill. 36; *Zonone v. Mound City*, 11 Ill. App. 339. (c) Section 2 of Ordinance 7667 contains no standard of safety, but makes the lawfulness of the structure depend upon the whim or caprice of the superintendent of buildings and fire warden. It is unconstitutional. *Hays v. Popular Bluff*, 263 Mo. 516; *St. Louis v. Cons. Co.*, 244 Mo. 489; *Baltimore v. Radake*, 49 Md. 217; *In re Frazee*, 63 Mich. 396; *State v. Dering*, 84 Wis. 585; *State v. Mahner*, 43 La. Ann. 496; *Yick Wo v. Hopkins*, 118 U. S. 356. (d) Under her own testimony plaintiff was guilty of contributory negligence as a matter of law, precluding recovery. *Pattison v. Amusement Co.*, 141 N. Y. Supp. 588, 156 App. Div. 368; *Bohrbacher v. Gillig*, 203 N. Y. 413; *Brugher v. Buchtenkirch*, 167 N. Y. 153; *Piper v. Railroad*, 156 N. Y. 224; *Hilsenbach v. Guhring*, 131 N. Y. 674; *Diamond v. Kansas City*, 120 Mo. App. 189; *Border v. Sedalia*, 161 Mo. App. 633. (3) The juror Caldwell was not disqualified and the court erred in sustaining plaintiff's challenge and excusing him from panel. *Joyce v. Railway*, 219 Mo. 351, 361. (4) It was incompetent for the witness Smith to give his opinion as to the possibility and practicability of a certain method of construction. *St. Louis, etc., Co. v. Stock Yards Co.*, 120 Mo. 550; *Koenigs Railroad*, 173 Mo. 720; *Benjamin v. Railway*, 133 Mo. 289. (5) The court erred in permitting plaintiff to fundamentally change her cause of action by amending her Second Amended Petition. At this stage every amendment is prohibited which substantially changes the cause of action. *R. S. 1909*, sec. 1848; *Pruett v. Warren*, 71 Mo. App. 86; The change made was substantial and not permissible. *Ingwerson v. Railroad*, 205 Mo. 328; *International Harv. Co. v. Lanpher*, 183 S. W. 1105; *Bliss on Code Pleading* (3 Ed.), 396; *Peery v. Railroad*, 122 Mo. App. 182; *Ray v. Dodd*, 132 Mo. App. 444; *Compton v. Railroad*, 147 Mo. App. 421; *Riley v. Railroad*, 124 Mo. App. 278. (6) The court erred in refusing to discharge the jury and to grant defendants a continuance after such radical amendment. *McDonald v. Construction*

Oakley v. Richards.

Co., 183 Mo. App. 429. (7) The court erred in refusing to allow defendants to withdraw answer and file demurrer. The amendment *ipso facto* withdrew the petition. *Ingwerson v. Railroad*, 205 Mo. 335. (8) The court erred in overruling defendants' motion to require plaintiff to elect. Authorities under Point 5. (9) Plaintiff's Instruction 21½ erroneous. Ordinary usage by others in the same line of business is a defense. *Peck v. Amusement Co.*, 195 S. W. 1033; *Brands v. Car Co.*, 213 Mo. 708; *Chrisman v. Telephone Co.*, 194 Mo. 208; *Bohn v. Railroad*, 106 Mo. 434; *Smith v. Railroad*, 69 Mo. 40; *Harrington v. Railroad*, 104 Mo. App. 671. Presumptively other operators had obtained permission to operate their theatres as they were being operated. Hence the instruction violates at least two constitutional principles, (1) that no State shall deny to any person the equal protection of the laws, and (2) the prohibition of special privileges and immunities. *Hays v. Poplar Bluff*, 263 Mo. 516; *St. Louis v. Cons. Co.*, 244 Mo. 489; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220.

M. T. Prewitt and Hogsett & Boyle for respondents.

(1) The plaintiff made a case for the jury upon the common-law allegations of negligence in the petition. 38 Cyc. 268; *Hollis v. Merchants Ass'n*, 205 Mo. 508; 1 *Thompson on Neg.*, secs. 994, 995; *Crane v. Exhibition Co.*, 168 Mo. App. 304; *Edling v. Exhibition Co.*, 181 Mo. App. 327; *Murrell v. Smith*, 152 Mo. App. 95; *Nephler v. Woodward*, 200 Mo. 179; *Andre v. Mertens*, 88 N. J. L. 626; *Branch v. Klatt*, 131 N. W. (Mich.) 107; *Valentine Co. v. Sloan*, 101 N. E. (Ind.) 102; *Dalton v. Hooper*, 168 S. W. (Tex.) 84.; *Noack v. Wosslick*, 182 Ill. App. 425; *Currier v. Boston Music Hall Assn.*, 135 Mass. 414; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *New Theater Co. v. Hartlove*, 123 Md. 78; *Butcher v. Hyde*, 30 N. Y. Supp. 1073. (2) Plaintiff made a case for the jury under Ordinance No. 7667. (a) The violation of an ordinance is negligence *per se*. *Johnson v. Railroad*, 203 Mo. 400; *Holland v. Railroad*, 210 Mo.

350; *Laun v. Railroad*, 216 Mo. 578; *King v. Railroad*, 211 Mo. 1; *Stotler v. Railroad*, 200 Mo. 120; *Wendler v. House Furnishing Co.*, 165 Mo. 527; *Hirst v. Real Estate Co.*, 169 Mo. 194; *Purcell v. Shoe Co.*, 187 Mo. 289. (b) The superintendent of buildings did not approve the construction of the step-off in question; but even if he had done so, this would have been no defense. 29 Cyc. 439; *Pitcher v. Lennon*, 42 N. Y. Supp. 156; *Simpson v. Iron Wks. Co.*, 249 Mo. 388; *McRickerd v. Flint*, 114 N. Y. 222; *Carrigan v. Stillwell*, 97 Me. 247, 61 L. R. A. 163; *Willy v. Mulledy*, 78 N. Y. 310; *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277; *Rose v. King*, 49 Ohio St. 213, 15 L. R. A. 160. (3) Defendants, by having pleaded and relied upon the Picture Show Ordinance as a defense in their former answer, are now estopped to challenge the constitutionality of said ordinance. (a) The courts do not with patience consider shifting attitudes of litigants. *St. Louis v. United Rys. Co.*, 263 Mo. 426; *Lilly v. Menke*, 143 Mo. 145; *Bensieck v. Cook*, 110 Mo. 173; *Bigelow on Estoppel* (5 Ed.), 673, 717; *McClanahan v. West*, 100 Mo. 309; *Brown v. Bowen*, 90 Mo. 184; *Smiley v. Cockrell*, 92 Mo. 105; *Knoop v. Kelsey*, 102 Mo. 291; *Tower v. Moore*, 52 Mo. 118; *Choteau v. Gibson*, 76 Mo. 39; *McGuire v. Nugent*, 103 Mo. 161; *Coney v. Laird*, 153 Mo. 435; *McClure v. Clement*, 161 Mo. App. 29; *Davis v. Wackerle*, 156 U. S. 689. (b) Constitutional rights may be voluntarily waived by a litigant, and when waived they cannot be reasserted. *Fiedler v. Construction Co.*, 178 S. W. 765; *Roper v. Greenspon*, 198 S. W. 1108. (c) Constitutional questions must be timely raised, at the first opportunity possible; and unless so raised they cannot avail a litigant. *Hanks v. Hanks*, 218 Mo. 674; *Lohmeyer v. Cordage Co.*, 214 Mo. 689; *Speer v. Railroad*, 174 S. W. 381. (4) The Picture Show Ordinance is not unconstitutional. (a) The ordinance has for its object the safety of theater patrons, and falls within the police power. *Ewing v. Chase*, 37 App. Cas. (Dist. of Col.) 53; *District of Columbia v. Brooke*, 214 U. S. 138; *Barbier v. Connelly*, 113 U. S. 31; *Health*

Oakley v. Richards.

Dept. v. Trinity Church, 145 N. Y. 32. (b) The ordinance does not delegate legislative power to the superintendent of buildings and fire warden, but only authorizes them as ministerial officers to exercise a discretion on a matter of safety dependent upon their inspection. *State v. Vickens*, 186 Mo. 106; *Arms v. Ayer*, 192 Ill. 601, 58 L. R. A. 277; *Block v. Chicago*, 239 Ill. 251; *Waldo v. Christman*, 130 N. Y. Supp. 260; *Railway Co. v. Lyons*, 155 Ky. 396; *United States v. Romard*, 89 Fed. 156; *Spiegler v. Chicago*, 74 N. E. (Ill.) 718; *Eubank v. Richmond*, 110 Va. 749; *Plinklewisch v. Light & Power Co.*, 115 Pac. (Ore.) 151; *Commonwealth v. Maletsky*, 203 Mass. 241; *Centralia v. Smith*, 103 Mo. App. 440; *Welch v. Swasey*, 193 Mass. 364. (c) The ordinance does not deprive defendants of due process of law. *Hulett v. Railway Co.*, 145 Mo. 35; *State v. Shepard*, 177 Mo. 243; *State v. Mercantile Co.*, 184 Mo. 183; *St. Joseph v. Truckenmiller*, 183 Mo. 16; *Homes v. Murray*, 207 Mo. 418; *Matthews v. Railway Co.*, 121 Mo. 298; *Railroad Co. v. Zerneck*, 183 U. S. 582; *Clark v. Russell*, 97 Fed. 900. (d) The ordinance does not deprive defendants of the equal protection of the laws. *State v. Brodnax*, 228 Mo. 44; *Magoun v. Bank*, 170 U. S. 293; *Hayes v. Missouri*, 120 U. S. 68; *Barbier v. Connolly*, 113 U. S. 32. (e) The ordinance does not provide for the irrevocable grant of special privileges and immunities. *State v. St. Louis*, 207 Mo. 354. (f) A municipal ordinance is presumed to be legal and valid and will be held unconstitutional only if it appears so beyond a reasonable doubt. *St. Louis v. United Rys. Co.*, 263 Mo. 392; *State v. Railroad*, 174 S. W. 64. (5) Since the judgment is supported by a finding of common-law negligence, complete in itself, it is not necessary to a decision of this case to pass upon the constitutionality of the picture show ordinance. *Plumlee v. Swan Machinery Co.*, 189 S. W. 581; *Thomure v. Railroad*, 191 Mo. App. 640; *Nelson v. Railway Co.*, 113 Mo. App. 707; *Fiester v. Drozda*, 185 S. W. 748; *Moyer v. Railroad*, 198 S. 275 Mo.—18

W. 842. (6) Plaintiff was not guilty of contributory negligence as a matter of law. *Nephler v. Woodward*, 200 Mo. 179; *New Theater Co. v. Hartlove*, 123 Md. 78; *Andre v. Mertens*, 88 N. J. L. 626; *Branch v. Klatt*, 131 N. W. (Mich.) 107; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Bender v. Weber*, 138 Mo. App. 537. (7) There was no error in excusing juror Caldwell. *Glasgow v. Railway Co.*, 191 Mo. 347; *Theobald v. Transit Co.*, 191 Mo. 395; *Billmeyer v. Transit Co.*, 108 Mo. App. 6; *State v. Faulkner*, 185 Mo. 674; *McFall v. Railway Co.*, 185 S. W. 1157; *Heidbrink v. Railway Co.*, 133 Mo. App. 40; *Carroll v. Railways Co.*, 137 Mo. App. 248. (8) There was no error in permitting witness Smith to testify that it was possible and practicable to overcome the difference in level between the aisle and seat platform by means of a gradient or inclined plane. *Combs v. Construction Co.*, 205 Mo. 367; *Smith v. Fordyce*, 190 Mo. 1; *Turner v. Haar*, 114 Mo. 335; *Hamilton v. Mining Co.*, 108 Mo. 364; *Cobb v. Railroad*, 149 Mo. 609; *Skinner v. Glass Co.*, 103 Mo. App. 650; *Buckalew v. Railway Co.*, 107 Mo. App. 575; *Line v. Mason*, 67 Mo. App. 279. (9) The court did not err in permitting plaintiff to amend her petition by pleading the Picture Show Ordinance, or in refusing defendants' motion for continuance, or in refusing to permit defendants to withdraw their answer, or in overruling defendants' motion to require plaintiff to elect. (a) Defendants could not possibly have been surprised by the amendment, for they themselves had pleaded and proven the picture show ordinance, and their own evidence had proven their violation of it. (b) The matter of amendments is one peculiarly within the sound discretion of the trial court, and amendments are favored by the law. *Wright v. Groom*, 246 Mo. 159; *Sonnenfeld v. Rosenthal*, 247 Mo. 267; *Clarkson v. Lee*, 133 Mo. App. 53; *Farmington v. Telephone Co.*, 135 Mo. App. 697; *House v. Duncan*, 50 Mo. 453; *Joyce v. Growney*, 154 Mo. 263; *Allen v. Ranson*, 44 Mo. 267; *Carr v. Moss*, 87 Mo. 447; *Mullery v. Telephone Co.*, 180 Mo. App. 128. (c) Defendants

Oakley v. Richards.

did not file any motion to strike out the petition as amended, but answered over and proceeded on with the trial on its merits. They thereby waived their right to object to the amendment. *Liese v. Meyer*, 143 Mo. 547; *Carter v. Baldwin*, 107 Mo. App. 228; *Grvmes v. Lumber Co.*, 111 Mo. App. 358; *Bernard v. Mott*, 89 Mo. App. 403. (d) The granting or refusing of continuances rests in the sound judicial discretion of the trial court. *Pidgeon v. Railways Co.*, 154 Mo. App. 20; *Rhodes v. Guhman*, 156 Mo. App. 344; *Lackey v. Lubke*, 36 Mo. 115; *Bartholow v. Campbell*, 56 Mo. 117; *Bank v. Williamson*, 61 Mo. 259; *Leabo v. Good*, 67 Mo. 126; *Keltenbaugh v. Railway Co.*, 34 Mo. App. 147; *Railroad Co. v. Holliday*, 131 Mo. 440; *Shirk v. Shirk*, 75 Mo. App. 573. (e) There was no error in refusing defendants' leave to file a demurrer to the petition as amended. The petition stated facts sufficient to constitute a cause of action and the demurrer tendered by defendants was frivolous. And defendants waived the point by answering over and proceeding on with the trial of the case on its merits. Cases cited under sub-point (c) above. (f) There was no error in overruling defendants' motion to elect. Plaintiff did elect. (10) Plaintiff's instruction $2\frac{1}{2}$ is not erroneous. *Austin v. Shoe Co.*, 176 Mo. App. 571; *Fairfield v. Bichler*, 190 S. W. 33. (11) Instruction I was properly refused because a patron of a moving picture show does not assume risks due to defendants' negligence. *Pointer v. Constr. Co.*, 269 Mo. 128; *Valentine Co. v. Sloan*, 101 N. E. (Ind.) 102.

BLAIR, J.—This is an appeal from a judgment respondent recovered for damages for injuries she received from falling when she attempted to pass from her seat into the aisle of a moving-picture theater owned and operated by appellants. The evidence conflicts. That for respondent tends to show the theater was quite dark; she was unable to see the floor at her feet; she could see, merely as a dark object, her companion who preceded her into the aisle; she left

her seat and walked toward the aisle; as she did so she held to the back row of seats in front of her; the seats were upon a platform or floor which at the end of the row in which respondent had been seated was four inches above the level of the aisle; as respondent attempted to enter the aisle her heel was caught or placed upon the edge of the floor upon which the seats stood and she lost her balance and fell; she was seriously injured. She had not previously visited the theater. There is no dispute that patrons were invited to enter and leave, and did enter and leave, the theater at will during performances.

Numerous errors are assigned. Other facts can best be stated in connection with the particular questions to which they are relevant.

I. It was the duty of appellants to use ordinary care to see that the place to which they invited their patrons was reasonably safe for use for the purposes for which it was designed. [*Hollis v. Merchants' Assn.*, 205 Mo. l. c. 520.] The jury was warranted in finding that respondent's fall was due to her inability to see the step-off on account of the darkness in the theater. "It is a matter of common knowledge" that a four-inch depression in a floor "is sufficient to cause one to fall" who, in the absence of light and knowledge of its presence, steps into or upon the edge of it. [*New Theater Co. v. Hartlove*, 123 Md. l. c. 86.] It is not contended the presence of the step-off, alone, was negligence. It was the absence of light sufficient to enable respondent to see the depression which brought about her fall. The evidence was sufficient to warrant a finding of negligence. [*Valentine Co. v. Sloan*, 53 Ind. App. 71; *New Theater Co. v. Hartlove*, 123 Md., *supra*; *Andre v. Mertens*, 88 N. J. L. 628; *Marwedel v. Cook*, 154 Mass. 235; *Little v. Holyoke*, 177 Mass. 116; *Faxon v. Butler*, 206 Mass. 504; *Marston v. Reynolds*, 211 Mass. 592; *Nephler v. Woodward*, 200 Mo. 179; *Camp v. Wood*, 76 N. Y. 95; *Currier v. Music Hall*, 135 Mass. 414.] Appellants

Oakley v. Richards.

rely upon cases holding that steps and stairways of ordinary construction are reasonably safe when used as means of overcoming differences in level. They do not decide the question in this case. [Little v. Holyoke, 177 Mass. 116.] Peck v. Yale Amusement Co., 195 S. W. 1033, is cited. In that case the evidence failed to show what caused the injury. Mrs. Peck was familiar with the stairway, and the light was like that usually found in moving-picture theaters. In attempting to use a properly constructed stairway of the presence of which she had previous knowledge, she fell, and from her evidence "no court could say just what did cause her fall." That case is not in point. The question of negligence in this case was for the jury.

II. The question of contributory negligence was for the jury. The passage between the seats led into the aisle as a means of egress. Seeing others use the aisle and invited to use it herself, "can it be said, as a matter of law, that a person seeking to leave a public theater, and following the only path leading to an exit, should apprehend that that path contained an unsafe place or pitfall or the like?" [Branch v. Klatt, 165 Mich. 671.] In the same case it is said that "the very fact of the premises being maintained in a darkened condition might give added assurance of its being reasonably safe." The evidence fairly supports a finding against contributory negligence. [New Theater Co. v. Hartlove, *supra*; Andre v. Mertens, *supra*; Nephler v. Woodward, 200 Mo. 188; Lewis v. Shows Co., 98 Kan. 148; Marston v. Reynolds, *supra*; Faxon v. Butler, *supra*; Marwedel v. Cook, *supra*.]

III. The petition originally counted on (1) common-law negligence, and (2) violation of Section 156 of the Building Code. The answers pleaded at length Ordinance No. 7667, which purports specifically to regulate, in some respects, moving-picture shows. It contains this provision: "No steps shall be permitted in any aisle or in any part

**Amending
Petition.**

of the auditorium floor, except by written permission of the Superintendent of Buildings and Fire Warden." The answers averred this ordinance repealed Section 156 of the Building Code insofar as it applied to moving-picture shows. They also averred the building was inspected and approved by the Superintendent of Buildings and Fire Warden, and, subsequently, a license to conduct the show was issued. Appellants offered evidence tending to show the plans for remodeling were approved by the Superintendent of Buildings, and that the Fire Warden inspected the premises after the work was completed. No formal written permission to install the step-off was in evidence, and no writing of any kind, signed by the Fire Warden, was offered. Appellant owners testified they knew of no other permits having been issued. After the evidence was in, respondent secured leave to amend her petition by interlineation to conform to the proof by adding a charge that Ordinance 7667 had been violated.

The amendment to the pleading did not change the defense. Appellants' answers had been on file nearly six months. Those answers pleaded Ordinance 7667 in full, and pleaded inspection and approval thereunder by the Superintendent of Buildings and Fire Warden, and the subsequent licensing of the theater as a defense to the action. Compliance was essential to such defense. Counsel contended then and contend now that their evidence showed, as a matter of law, that appellants had complied with the provision requiring written permission for the installation of the step-off. Every official who acted in the premises was put on the stand. Proof was made by appellants that every writing issued by the officials was in evidence. The issue was fully tried. There was a total failure of written permission by the Fire Warden. Indeed, the proof was he had given no such permission. This proof was made by appellants. One charge in the petition was that a provision of a designated ordinance prohibited inequalities in floor levels. Ordinance 7667 contained a like prohibition, subject to exception on

written permission of named officials. The substance of the charge in the original petition was a violation of an ordinance prohibition against inequalities. The substance of the amendment was a like charge. The differences lay in the number of the ordinance. That ordinance was pleaded by appellants, and the issue respecting compliance with it was tried at length. In such circumstances the allowance of the amendment was right. [Sec. 1848, R. S. 1909; Wright v. Groom, 246 Mo. 163 et seq.; Sonnenfeld v. Rosenthal, 247 Mo. 266, et seq.]

IV. It is urged permission under Ordinance 7667 was shown. No pretense is made that any formal permission in writing was given by any official, and it is clear no written permission of any kind was given by the Fire Warden. Appellants proved the contrary. General definitions of "permission" are of little value. The language of the ordinance is unambiguous. There is no room for a construction that the ordinance could be satisfied by implying permission from inspection of the premises. Appellants had the benefit of an instruction directing a verdict for them if the step-off was no higher than the approved plans indicated.

V. It is contended Ordinance 7667 is void because of the provision forbidding the employment of steps "except upon the written permission" of certain officials. It is said this vests an arbitrary power in the officials and falls within the principle applied in Hays v. Poplar Bluff, 263 Mo. 516, and like cases.

An ordinance conditionally restricting the exercise of a right, otherwise exercisable without question, and making that exercise dependent upon the arbitrary will of a city officer, may well be held invalid. On the other hand, matters of detail in enforcing ordinances otherwise valid may be left to designated officials. Again, it is held quite generally that in case

the city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from designated officials. [City of St. Louis v. Fischer, 167 Mo. 662, et seq.; affirmed, Fischer v. St. Louis, 194 U. S. 371.] The arbitrary *exercise* of the discretion would present another question. In this case it is not suggested the city might not lawfully prohibit absolutely inequalities in levels in darkened theaters. It might do so. The case falls within the rule in the cases above cited. [2 Dillon on Municipal Corporations, sec. 598.] The cases cited by appellants fall within the other principle.

VI. The demurrer appellants asked leave to file was general in character except insofar as it questioned the validity of Ordinance 7667. That ordinance was valid. The petition was not vulnerable to this **Demurrer.** sort of attack. It is not now denied, as we understand it, that it states a cause of action. The filing of the demurrer could have availed appellants nothing.

VII. After the amendment to the petition, appellants asked leave to file a motion to require respondent to elect between the section of the building code pleaded and Ordinance 7667. Respondent **Motion to Elect.** immediately announced she elected to stand upon the common-law allegation and Ordinance 7667. She thereupon requested instructions, which were given, withdrawing from the jury the section of the building code and directing them to disregard it. No formal filing of a motion to elect could have secured appellants more.

VIII. The trial court was right in refusing the instruction on the assumption of risk. The instruction ignored the question whether there had been a violation of the ordinance pleaded. It also ignored the **Assumption of Risk.** question whether the usual construction and lighting of theaters in Kansas City was negligent. Other instructions refused commented on

Oakley v. Richards.

the evidence or ignored substantial questions or contained improper assumptions. Twenty instructions were given for appellants. These presented their case in a favorable light.

Instruction 2½ given for respondent told the jury, in substance, that if appellants permitted a step in the floor without the permission required by Ordinance

Custom. 7667, the fact that other theater owners permitted similiar steps constituted no defense. Courts do not permit the defense of custom to be made to violations of positive law. Further, the evidence showed no customary construction like that appellants insist was harmless. There was evidence that about *one out of ten* theaters in *Kansas City* had steps in the floor. The objections made to this instruction are not tenable.

IX. There was no error in sustaining the challenge to the talesman Caldwell. He testified his business relations with appellants were such that they might affect his verdict; that he preferred not to sit; that **Juror.** he felt "embarrassed to sit as a juror against these two men." He further stated he would exercise his judgment in returning a verdict according to the law and the evidence; that he would endeavor to do his duty. There is no ground for saying, in these circumstances, that the trial court acted arbitrarily in rejecting Caldwell. He heard Caldwell's testimony, observed his demeanor and was in a better position to pass upon the question the challenge presented. We are cited to no case which, in a like situation, holds a like ruling reversible error.

X. It is argued that it was error to permit an expert to testify that it was practicable to overcome differences in floor levels in theaters by gradients or inclined planes. It is said the jury was as **Expert** able to draw conclusions upon this question **Testimony.** as was the expert. All will agree differences in levels can be overcome in the manner stated.

Murphy v. Barron.

Whether such methods of overcoming them in theater floors are practicable is another question. The evidence falls within the rule in *Combs v. Construction Co.*, 205 Mo. 391, and was admissible.

Affirmed. All of the judges concur; *Bond, P. J.*, in result.

JOSEPH MURPHY et al., Appellants, v. WILLIAM N. BARRON.

Division One, July 5, 1918.

1. **QUIETING TITLE: Pleading: Equitable and Legal Title: Relief.** In a suit brought under Sec. 2535, R. S. 1909, the petition may contain two counts, one asking for a determination of the title, and the other sounding in ejectment, and if defendant's title be found vulnerable in equity or void in law, plaintiff may have both possession and the removal of defendant's cloud.
2. **CONVICT: Sale of Land for Taxes: Void Judgment.** A judgment for taxes obtained against an owner of land incarcerated in the Penitentiary is void and a sale under execution does not affect the legal title. The statute specifically declares that a convict "shall be deemed civilly dead" during the term of his sentence, but it also says he "is and shall be under the protection of the law" and provides for the appointment of a trustee to "prosecute and defend all actions commenced by or against the convict;" and if the State, instead of pursuing the course thus provided by the statute, proceeds against him directly for the taxes due from his land at a time when he cannot be haled into court, the judgment does not affect the legal title.
3. **TITLE TO LAND: Judgment as Estoppel.** In order that a judgment may have the effect of transferring title to land by estoppel, it must be pronounced by a court acting within the limits of a jurisdiction which authorizes it. If the court in pronouncing the judgment acted by virtue of a special or limited statutory jurisdiction, it can be upheld only when the plain letter of the law permits it.
4. **———: ———: Condemnation: Adverse Claimants to Award: Determination of Title.** Commissioners appointed by the court to assess damages in a condemnation proceeding begun by a railroad company estimated the value of a right-of-way one hundred

Murphy v. Barron.

feet wide through forty acres of land, at one hundred dollars. Plaintiff at the time was in possession claiming title, and defendant held a recorded deed made by the sheriff as a result of an execution sale under a judgment for taxes obtained against the plaintiff, who at the time the tax judgment was rendered was the owner and under sentence for a felony. The railroad company did not pay the money into court, but defendant upon the filing of the commissioners' report filed an interplea alleging he was the owner of the land and that plaintiff had no title or interest therein and asking that the money be awarded to him, and plaintiff later filed a like interplea alleging he was the owner and that defendant's deed was void and asking that the money be awarded to him. The trial court rendered judgment adjudging the defendant to be the owner of the land and ordering that the money be paid to him when it was paid into court. It was not paid into court, but defendant testified that it was paid to him. *Held*, that the judgment did not have the effect of transferring the title to defendant, but the contest related solely to the fund, and not to the land. *Held*, further, that the statutory proceeding for the fund was one *in rem* and jurisdiction cannot exist without the *res*, and the statute providing for an interplea only when the award is paid into court and that not having been done, the court had no jurisdiction to consider the title to the land or to award the fund to defendant.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*, Judge.

REVERSED AND REMANDED.

L. M. Henson for appellants.

(1) A convict confined in the penitentiary for a term less than life is civilly dead, and when his estate is being attacked by a suit, he can, under the statute, be in court only through a trustee, and no valid judgment affecting his property can be rendered until the trustee has been appointed and brought into court. Secs. 2891 to 2920, R. S. 1909; *McLaughlin v. McLaughlin*, 228 Mo. 635. (2) The judgment and proceedings in the case of the Butler County Railroad Company v. Murphy, Barron et al., did not affect the rights of the parties herein as the title to the land in question was not involved in that suit. The only ques-

Murphy v. Barron.

tion adjudicated in that case between the parties to this suit was the ownership of one hundred dollars in money. Cox v. Barker, 150 Mo. 424; Price v. Blankenship, 144 Mo. 203; Hilton v. City of St. Louis, 129 Mo. 389. (3) Neither of the appellants were parties to the ejectment suit brought by Barron against Baurton, and are not bound thereby. The deed made to Baurton by Murphy was void for the reason that Murphy was civilly dead at the time of its execution. Williams v. Shackelford, 97 Mo. 322. Even if Baurton's deed had been valid, Murphy still held a deed of trust on the land and his interest could not be affected by a judgment against Baurton.

Lew R. Thomason for respondent.

(1) A person confined in the penitentiary for a term less than life, under the provisions of Sec. 2891, R. S. 1909, is not *civiliter mortuus*; his civil rights are simply suspended during the period of incarceration. R. S. 1909, sec. 2891. The civil rights of the convict are not suspended until actually imprisoned in the penitentiary. R. S. 1909, sec. 297; In re Morse, 117 Fed. 763; Harmon v. Bower, 17 L. R. A. (N. S.) 502. The actual imprisonment of Murphy did not begin until some time in February, 1903. He was summoned to appear in the tax suit September 16, 1901, ten months before he was first sentenced and seventeen months before his imprisonment began. The court having acquired jurisdiction over the person of Murphy, and having jurisdiction of the subject-matter of an action to enforce the lien of the State for delinquent taxes, the judgment rendered in the tax case on the 19th day of June, 1903, was not void. Had Murphy died a natural death after the service of process upon him and before the rendition of judgment against him, even though his personal representative was not made a party to the action or trustee appointed to represent him, the judgment would not have been void, or subject to collateral attack. Coleman v. McAnulty, 16 Mo. 173; Castleman v. Relf, 50 Mo. 588; Bank v. Walters, 52 Mo.

Murphy v. Barron.

35; Lewis v. Combs, 60 Mo. 48; William v. Hudson, 93 Mo. 524; Shea v. Shea, 154 Mo. 599; Black on Judgments, sec. 200; Van Fleet on Collateral Attack, sec. 602; State ex rel. Potter v. Riley, 219 Mo. 684; Collins v. Mitchell, 5 Fla., 364; Clafin v. Dunne, 129 Ill. 241; Reid v. Holmes, 127 Mass. 326; Wood v. Watson, 107 N. C. 52; Swasey v. Antrem, 24 Ohio St. 87; Mitchell v. Schonlover, 16 Ore. 217; Giddings v. Steel, 91 Am. Rep. 336; Powell v. Washington, 15 Ala. 803; West v. Jordon, 62 Me. 484; Yapple v. Titus, 41 Pa. St. 195; Pugh v. McCue, 86 Va. 475; King v. Burdett, 57 Am. Rep. 687; Hays v. Shaw, 20 Minn. 405; Beard v. Roth, 35 Fed. 397; New Orleans v. Gains, 138 U. S. 595. Any attempt to impeach the judgment or decree of the court, in any proceeding not instituted for the express purpose of annulling or vacating said judgment or decree, and not instituted in the time and manner as provided by law, is a collateral attack. Van Fleet on Collateral Attack, secs. 2, to 4; Morill v. Morill, 20 Ore. 96; Thom v. Ireland, 88 Ky. 581; Hope v. Harrison, 84 Tenn. 82; State ex rel. Potter v. Riley, 219 Mo. 684. (2) Circuit courts are courts of general jurisdiction, and when such a court has acquired jurisdiction, however erroneous or irregular its proceedings may be, its judgments are valid and binding until they have been reversed or annuled by suitable proceedings instituted for that purpose. And titles acquired by sales under them, by bona-fide purchasers, will not be affected, even though said judgment should be subsequently set aside. Jones v. Talbot, 9 Mo. 123; Coleman v. McAnulty, 16 Mo. 173; Choteau v. Nuckolls, 20 Mo. 442; Shields v. Powers, 29 Mo. 335; Fithian v. Monks, 43 Mo. 522; Gott v. Powell, 41 Mo. 416; Volger v. Montgomery, 54 Mo. 577; Johnes v. Hart, 60 Mo. 362; Macklin v. Allenburg, 100 Mo. 337; Shipman v. Smith, 154 Mo. 214; Hefferman v. Ragsdale, 199 Mo. 384; Board of Trustees v. Fry, 199 Mo. 563; Growdy v. Hall, 36 Ill. 313; Gray v. Bernardello, 1 Wall. U. S. 627; Vorhees v. Bank, 10 Pet. U. S. 450. (3) In the case of the Butler County Railroad condemnation pro-

ceeding for a part of the lands in controversy, against Murphy and Barron, as defendants, the ownership of the land in controversy was a direct issue upon the pleadings filed. The court found and adjudged Barron to be the owner. This decree was affirmed upon appeal. A question of the law, or fact, is *res adjudicata*, if it was a material issue in the proceedings, and not merely cognizable or collaterally in question, and was adjudged upon its merits. Van Fleet on former Adjudication, secs. 1 and 2; Mason v. Summers, 24 Mo. App. 174; Young v. Berg, 24 Mo. 590.

BROWN, C.—This suit was instituted in the Butler Circuit Court December 5, 1914, by petition containing two counts. The first of these is framed upon the provisions of Section 2535, Revised Statutes 1909, and is, omitting caption and signatures, as follows:

“Plaintiffs, for their cause of action, state that they are the owners of and claim the legal title to the following described real estate, lying, being and situate in the county of Butler, and State of Missouri, to-wit; all of the Southwest Quarter of the Southeast Quarter of Section Seventeen in Township Twenty-four north, Range Seven east, except a strip 100 feet wide heretofore condemned for railroad right of way.

“That the defendant claims some title, interest and estate in said land, which said title is based and predicated upon a void judgment rendered in the circuit court of Butler County, Missouri, in Tax Suit No. 6486, on the 19th day of June, 1903, and execution sale thereunder, wherein the State of Missouri, at the relation and to the use of John H. Souders, Collector of Revenue in and for the County of Butler and State of Missouri, was plaintiff, and plaintiff Joseph Murphy et al. were defendants.

“Plaintiffs further state that, at the time the judgment above referred to was rendered and at the time the sale thereunder was made, plaintiff Joseph Murphy was incarcerated in the Penitentiary of the State of Missouri, under and by virtue of a judgment and sent-

Murphy v. Barron.

ence theretofore rendered in the circuit court of said Butler County, Missouri, against him, upon a charge of a felony, which said judgment and sentence was for a term of years less than life imprisonment, and that at the time said tax judgment was rendered and said sale was made, no guardian, trustee, nor legal representative was appointed by the court, nor did any such representative appear on behalf of the said Joseph Murphy in said proceedings.

"Plaintiffs further state that the claim of the defendant is adverse and prejudicial to the title and ownership of these plaintiffs in and to said land.

"Wherefore plaintiffs pray the court to set aside the judgment and sale above mentioned and to cancel the deed and all mesne conveyances made thereunder, and further pray the court to try, ascertain and determine the title of the parties hereto in and to said real estate, and, by its judgment and decree, define said title, and for such other orders in the premises as to the court may seem meet and just.

"And if the court finds that the claim of defendant in and to said real estate is founded upon the invalid tax sale above mentioned and that the defendant has, in good faith, paid any taxes on said land, under and by virtue of said claim, plaintiffs hereby tender the full amount of all of said taxes to the defendant, together with six per cent interest thereon from the dates the same were paid until this time, and hereby offer to pay the same as soon as the amount thereof, if any, is ascertained and determined by this court."

The second count is in the ordinary form in ejectment.

The second amended answer, upon which the cause was tried, sets forth the judgment for taxes pleaded in the first count of the petition, recites personal service of summons on Joseph Murphy, the defendant in that suit and plaintiff in this, on October 7, 1901, returnable to the next October term of the Butler Circuit Court; that on June 19, 1903, judgment was rendered in said cause in the amount of \$8.97 for taxes

and also for the costs of said suit; that on July 31, 1903, special execution issued on this judgment and the land sold thereunder on October 5th to Charles F. Green, by whom it was conveyed on the 10th day of the same month to defendant; that on August 11, 1911, the Butler County Railroad Company began suit against Joseph Murphy, Sarah Murphy, William N. Barron and M. C. Horton to condemn a strip of the land one hundred feet wide for its right of way, alleging in its petition that the land was owned by one or another of the defendants in that suit; that the suit proceeded to an award by commissioners of \$100 damages, which was paid into court for the owner, and the railroad company took possession, and that afterward Barron and Horton "filed an answer in said cause in the nature of an interplea," alleging their ownership of the land, both legal and equitable, and demanded the fund, while Joseph Murphy and Sarah Murphy, his wife, filed a like pleading asserting their own ownership and claiming the fund. At a trial of these issues on October 23, 1912, the Butler Circuit Court found that Barron was the owner of that land and awarded the fund to him. This was affirmed on appeal by the Murphys to the Springfield Court of Appeals. [173 Mo. App. 370.] These facts were pleaded in bar as an adjudication of the title to the land and also with other facts as constituting an estoppel *in pais*.

The answer also pleaded the Statute of Limitations of ten years by virtue of the provisions of Section 1881, Chapter 21, Article 8, and Section 1894, Chapter 21, Article 9, of the Revised Statutes. The answer to the second count admitted possession and pleaded limitations under the same statute.

Issue was joined by replication.

The following facts are admitted or uncontroverted. On and prior to August, 1901, the plaintiff Joseph Murphy was the owner in fee of the land in suit and is the common source of title. On August 10, 1901, an action was brought against him by the State at the relation of the collector of Butler County to recover

Murphy v. Barron.

delinquent taxes for the year 1899, and summons issued therein on September 5, 1901, returnable at the October term, and was duly served. The action was continued at the return term and until the June term, 1903, when judgment was entered for \$8 and costs of suit. On July 31, 1903, a special execution was issued in said cause, under which the land was, on October 5th, duly sold by the sheriff to satisfy said judgment. One Green became the purchaser, received a sheriff's deed therefor, dated October 7, 1903, and conveyed to Barron by quitclaim deed, dated October 10, 1903.

On July 23, 1902, Murphy was convicted in the Butler Circuit Court of a felony, and sentenced to a term of two years in the State Penitentiary. He was not at that time incarcerated in the Penitentiary under this sentence, but was held to answer another charge of felony pending in the same court, in which he pleaded guilty on February 13, 1903, and received a like sentence. He was then sent to the Penitentiary upon both sentences, and there remained confined until June, 1905, when he was discharged.

On June 26, 1902, the plaintiff, joined by his wife, conveyed the land in suit to Gus Baurton, who, with his wife, executed a deed of trust conveying the same land on the same day to Joseph Murphy, and on January 14, 1904, conveyed the same land by warranty deed to both these plaintiffs.

In 1904, at a date not otherwise mentioned in the record, the defendant Barron recovered in the Butler Circuit Court a judgment by agreement against Gus Baurton and Maggie Baurton, his wife, for the possession of the land in suit. The costs were adjudicated in favor of the Baurtons and against the plaintiff. The Murphys took possession of the land in controversy upon Joseph's release from the Penitentiary in 1905, and remained in possession by himself and his tenants up to the spring of 1914, when he was ousted by the sheriff under the judgment obtained by Barron against

Baurtons in 1904, and the defendant was placed in possession.

The respondent was vice-president and general manager of the Butler County Railroad Company, which instituted the suit for condemnation pleaded in the answer in this case, the object of which was to condemn a strip of land one hundred feet wide for right of way for the company's railway across this land. Commissioners were appointed to assess the damages, and after the filing of their report awarding damages in the amount of one hundred dollars with respect to this particular tract, respondent and one M. C. Horton filed a motion in the nature of an interplea alleging that they were the owners of the land and that appellants had no right, title or interest therein. The appellant, at the next term, filed a like plea containing a similar allegation of ownership, and asking that the money, when paid into court, should be awarded to them. A trial was had upon these motions resulting in a judgment or order declaring Barron to be the owner and ordering the money paid to him when it should be paid into the court. The money was never paid into court. Barron testifies that it was paid to him.

I. This is in form an action to quiet title to forty acres of land in Butler County, Missouri, instituted under the provisions of Section 2535 of the present revision of our statutes. The petition, **Joining Equitable and Legal Issues.** in form, contains two counts; the first being in the usual form in actions under this statute. It also sets out that defendant's claim arises out of a tax judgment rendered against plaintiff while he was incarcerated in the Penitentiary of this State under sentence, and asks, in addition to the usual relief, that this judgment be set aside.

The second count is the ordinary one in ejectment.

The petition seems to have been framed in this form to take advantage of a favorable opinion of the court on either the legal or equitable theory of the right asserted. The defendant's title might be found

vulnerable to attack in equity or void in law. They are entitled, under the section cited, to the same broad relief in either case. If the plaintiffs are still seized of the legal title, notwithstanding the sheriff's sale, they may not only have possession, but also the removal of that cloud. [McLaughlin v. McLaughlin, 228 Mo., 1. c. 655.]

II. Our Legislature has seen fit to provide that a sentence of imprisonment in the Penitentiary for a term less than life "suspends all civil rights ^{Convict.} of the person so sentenced during the term thereof," and that the person so sentenced "shall thereafter be deemed civilly dead."

The words "civil rights" constitute a broad expression that, in its ordinary meaning, excludes access to the courts for every purpose other than to question the validity of the sentence, and no judgment could be rendered against him, because the personal jurisdiction of the court implies the constitutional right to appear and be heard. The defendant argues that this cannot be true in this case, because there are many cases, constituting the greater weight of authority, which held that a judgment may be immune from collateral attack, although rendered against the name of one naturally dead. There seems to us to be no analogy whatever between these classes of judgments. The person naturally deceased leaves living an immediate unbroken succession to all his rights and interests. The event that extinguishes his identity continues it in them, whether their interests arise in testamentary disposition, succession, or as creditors. They have been haled into court by the process with which he has been served, and may appear, as the issue may indicate, either by themselves or by the legal representative which the law provides, to answer in their own behalf. The deceased no longer needs protection.

One civilly dead through a sentence for a period which does not include the whole of his natural life stands in a different position. His sentence does not

include the sequestration of his possessions. The whole measure of his punishment is fixed by the term of his imprisonment, which amounts to full satisfaction to the State for his crime. He will still need his possessions when that satisfaction has been fully rendered, and it would ill become the State, which still owes him protection, to loot his estate through the action of its courts while disabling him from appearing to prevent it. Our State has by legislation fully recognized this duty by providing a method consistent with his full punishment, by which his estate may be preserved during its accomplishment. In the same article which pronounces him civilly dead it is provided (Section 2892) that he "is and shall be under the protection of the law." This is the key note of this statute. It is provided also, and evidently for the purpose of extending this protection, that upon the application of any of his relations or any relative of his wife or any creditor (Section 2896) the proper circuit court may appoint a fit person to be trustee of his estate (Section 2897), who may, after giving bond, prosecute and defend all actions commenced by or against the convict (Section 2901), and that the circuit court appointing him "may, at any time, order the sale, lease or mortgage of real estate, whenever the same shall be necessary for the payment of debts, or the support and maintenance of the family or the education of the children of such convict" (Section 2902), and shall settle all matters between him and his creditors (Section 2903), and "may, also, under the direction of the court, redeem all mortgages and conditional contracts, and all pledges of personal property, and satisfy judgments and decrees which may be an incumbrance on any property ordered to be sold, or he may sell such property, subject to such mortgage, pledges or encumbrances, as the court may direct" (Section 2904).

These are some of the provisions for the protection of a class which has been disabled, in the administration of the laws, from protecting themselves and their dependants. They embody a remedial system so just and

Murphy v. Barron.

reasonable as to recommend them to the consideration of the court, both in their interpretation and administration. The right of the convict to protect himself by contract, to appear in court, or to exercise any other civil right, has been extinguished (*William v. Shackelford*, 97 Mo. 322), and in all these enactments the State has assumed his protection. This case illustrates the theory upon which it has acted. The State was his *creditor* to the extent of eight dollars. The officer charged with its collection, instead of pursuing the course so directed, waited until the convict had lost his right and power to defend himself in court, and then took this judgment and enforced it by the sacrifice of his forty acres of land for that amount, and the attorney representing the State in the proceeding became the owner through his own sale. The question upon which the validity of his title stands are not new to this court. They were before it in *William v. Shackelford*, *supra*, in which it was held that a mortgage executed by the convict while undergoing his sentence was void. The effect of the same statute was again before us in the late case of *McLaughlin v. McLaughlin*, 228 Mo. 635, in which the validity of a judgment of this character was thoroughly considered, both upon principle and authority.

In the *McLaughlin* case, the wife had secured a decree of divorce from her husband on the ground that he had been convicted of murder and sentenced to a term of ten years in the Penitentiary. The summons in the divorce case had been served on the convict in the Missouri Penitentiary. The court granted the divorce with the care and custody of the children, and by its judgment vested the title of the homestead in the wife. No question was made in this court as to the jurisdiction of the circuit court over the defendant for the purpose of granting the divorce, but it was contended by the defendant that the property of the convict was under the protection of the State and that the title to the land could only be affected through the intervention of a trustee appointed as provided in the statutes to which

Murphy v. Barron.

we have referred. Assuming, as the parties assumed, that the convict was properly before the trial court for the purpose of the divorce, this court unqualifiedly sustained the plaintiff's contention that the judgment before it was void as to the disposition of the land. In this it only followed the plain provisions of the statute to which we have already referred.

Having arrived at the conclusion that the legal title to the land was unaffected by the sheriff's sale, it follows that it is vested in the plaintiffs. The fact that the defendant failed to demur for or otherwise plead a misjoinder of parties makes it unnecessary to further consider the status of the plaintiff's wife. They and those representing them continued in possession, either by themselves or their tenants, up to the spring of 1914. There being no evidence of any adverse possession until that time the pleas which refer to the Statute of Limitations need not be further considered. Nor does the voluntary payment of taxes by the defendant while plaintiffs and their tenants were in possession have any reference to the questions involving the legal title.

III. The controlling question in this case arises upon the effect of the "interplea" for the proceeds arising from the condemnation of the right of way of the Butler County Railroad Company. There was no money paid into court in that case. The respondent testified that it was paid directly to him. Both appellants and respondent were co-defendants in that case, and each presented a claim for the amount awarded by the commissioners when it should be paid. Each claimed title to the entire premises which was the subject of the award. The court after hearing the controversy determined, and so stated upon its record, that Barron was the owner and entitled to the compensation, and the railroad company paid it to him. There is nothing in the record, so far as we can find, showing the date of the filing or approval of the commissioners' report or the date of the payment of the money to

**Title by Estoppel:
Condemnation
Awards.**

Murphy v. Barron.

Barron, or whether such payment was made before or after the filing of his interplea. We note, however, from the opinion of the Court of Appeals, that after the filing of the interplea, and before the joinder of these appellants, they made an unsuccessful effort for an order upon the company to have it paid into court.

The question which is alleged to have been adjudicated in that proceeding is whether these appellants the Murphys, or the respondent Barron, then held the legal title to the land in suit. If this question of title was adjudicated, that adjudication constitutes the muniment on which it stands. Otherwise, the title, as we have already said, still stands in Murphy, the admitted common source, and his wife.

The judgment which may have the effect of transferring the title to land by estoppel, must, of course, be pronounced by a court acting within the limits of a jurisdiction which authorizes it. It follows that if the court in its pronouncement be acting by virtue of a special and limited statutory jurisdiction, it must look to the law conferring it. We mention this rule in passing, because the judgment on which the respondent relies was entered in the exercise of a power which we have justly characterized as "most extraordinary," and of which we have said: "Its exercise often operates oppressively as well as vexatiously to the citizen whose property is taken. Such high prerogative is only allowed 'where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.'" [Railway v. Railway, 138 Mo. 591, quoting from Cooley's Constitutional Limitations, page 651.]

The jurisdiction exercised in the appropriation of land for public purposes is circumscribed by Section 21 of Article 2 of the State Constitution, which distinctly provides with respect to compensation that "until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested." It is not contended here that the compensation was paid to

the then owner, nor was it ever paid into court for any purpose. On the contrary, the court refused to order its payment and a situation was thereby created in which these appellants felt compelled to apply to the court for an order that it be paid directly to them. The situation was thus created in which we are now called upon to determine whether the court acted within its jurisdiction in making the order that it be paid by the railway company directly to this respondent, so that its act amounted to an adjudication of this title. The money was in the possession of the railroad company. It owed it to neither of the claimants, as the condemnation was not complete. Nothing but its payment into court or to the true owner, could complete it. It asked no advice for the court. Its managing officer was himself a claimant of the fund and it simply stood by to wait what he might do in its interest or his own, as the case might be.

The statute authorizing the condemnation proceeding (1909, Sec. 2360) provides as follows: "It shall not be necessary to make any persons party defendant in respect to their ownership, unless they are either in actual possession of the premises to be affected claiming title; or have a title to the premises appearing of record upon the proper records of the county." The company conformed to this provision by making both Murphy, who was in possession claiming title, and Barron who held a recorded sheriff's deed, the defendants. Under these conditions commissioners were appointed to assess the damages for the appropriation of the right of way through the land, which of course included not only the value of the strip, but also the amount of damages to the entire tract resulting from the use appropriated. It was thereupon necessary for the railroad company to pay to the clerk of the court in which the proceeding was pending the amount of damages so assessed, within ten days from the filing of the report, unless it should elect within that time to abandon the proposed appropriation, which it might do subject to the payment of costs and damages. [Railway v. Railway, 138 Mo. 591.] Upon the payment to the clerk the Railway Company

was out of the contest. [Id., Sec. 2362.] It had nothing to do with the rights of those sued as owners. Nor had they anything further to do with the condemnation proceeding. In the absence of an appeal from the assessment, and no appeal was taken in this case, the condemnation was closed and the book sealed. Any contest which the former claimants might then have related solely to the fund, and not to the land, and involved no question pertinent to the contest between the company and the owners.

That this is the theory upon which the statute relating to the condemnation of lands for public uses is framed is evident. By its terms the public suffers no delay in the acquisition of the land, and the claimants are given a fund which in every respect constitutes the subject-matter of any controversy which they may have had with reference to its ownership. The process is not given in aid of any private controversy, but to serve a public purpose. Thenceforth the company, a mere agent for the public with reference to its easement, may not be permitted to use its extraordinary powers as such agent in aid of a personal controversy in no way related to its public function. The jurisdiction of the court in the determination of such collateral controversies arises from the possession of the fund alone. The proceeding is *in rem* and jurisdiction cannot exist without the *res*. It was no more effective to determine which of these parties was the owner of the land than would be the determination of arbitrators outside the court. It is unnecessary to determine what effect a judicial determination of the ownership of such a fund in the hands of the clerk might have upon the collateral question of ownership of the remaining land.

It necessarily follows from what we have here said that the judgment is reversed and the cause remanded to the Butler Circuit Court for further proceedings in accordance with this opinion. *Railey, C.*, concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur; *Bond, P. J.*, in the result.

THE STATE ex rel. MARY H. McCLINTOCK et al. v.
JULES E. GUINOTTE, Judge of Probate Court.

In Banc, July 15, 1918.

1. **CONSTITUTIONAL LAW: Descents and Distributions: Wills.** There is no constitutional provision restricting the power of the Legislature to change or modify the laws relating to descents and distributions or the laws relating to wills.
2. ———: **Inheritance: Not Natural Right.** Inheritance of property is not an absolute or natural right. There is no constitutional provision which would prohibit the Legislature from changing or abolishing entirely the law as to descents and distributions, whether the transmission of property be by will or by intestacy. The right to inherit property is neither a natural right, nor a constitutional right in this State, but a right which the sovereign may grant or withhold, or may grant upon condition; and since there is no constitutional restriction, the Legislature may abolish or modify the laws permitting the transfer of property by will, as well as statutes governing descents and distributions, and may say what portion, upon an owner's death, shall be appropriated by the State, and to whom and in what proportions the balance shall go.
3. ———: **Inheritance Tax.** The right of the State to foreclose absolutely or partially the right to inherit property, by law or will, and to say what is to become of it when death forecloses the owner's right to control it, is not strictly the exercise of the taxing power, although the percentage to be retained by the State is designated in the statute as a tax, but is the exercise of that other power which inheres in sovereignty, unless restricted by the Constitution, to say what shall be done with the property upon the owner's death. The designation of the portion to be retained or collected by the State as a tax is, in effect, an expression of the condition upon which the persons designated in the statutes of descents and distributions or in the testator's will may take the property, and is not a tax at all.
4. ———: ———: **Constitutional Restrictions.** Since a statute prescribing the amount of inheritance taxes shall be imposed on devises or inheritances is not an exercise of the taxing power, the validity of the statute is not affected by the divers and sundry constitutional restrictions relating to taxation.

State ex rel. McClintock v. Guinotte.

5. ———: ———: **Repeal of Conflicting Statutes.** The fact that the Act of 1917 designates the portion of an inheritance which the State is to retain or collect as a tax and that it does not in express words repeal statutes relating to descents and distributions or wills, does not make it an exercise of the taxing power. In spite of those things, it operates to repeal so much of those statutes as conflict with it.
6. ———: ———: **Due Process.** An inheritance law, which requires the probate court to appraise the property owned by a decedent, and to exempt \$15,000 of that devised to or inherited by his widow and \$5,000 of that devised to or inherited by each of his children, and requires an appropriation by the State of certain graduated percentages of the balance, as a condition of their receiving the inheritances or devises, not being an exercise of the power of taxation, does not in any sense deny to them due process of law.
7. ———: ———: **Title Act: Repeal of Conflicting Existing Statutes.** The title to the Inheritance Law of 1917 is in all respects sufficient, although the body of the act modifies or repeals, not by express words but by affirmative provisions, certain conflicting portions of the statutes relating to descents and wills, and no reference is made to them in the title. The body of the act is within the purview of the title and is clearly indicated by it, and that is sufficient; and that being true, so much of the existing statutes as conflict with it will be held to be to that extent repealed or modified.
8. ———: ———: **Payment into State Treasury.** Devisees or heirs, whose inheritances or devises have by the probate court been charged by its judgment with taxes according to the Inheritance Law, are not, in a *certiorari* to that court, by which they attack the constitutionality of said act, in any position to raise the point that the act violates that portion of the Constitution which provides that no money shall be diverted from the State Treasury except by proper appropriation bills. Whether that portion of the act requiring the money to be paid into the State Treasury and providing that upon proof of an erroneous payment the amount of the tax erroneously paid may be refunded, is valid or invalid, does not concern them, and is not in the case, and therefore is not decided, for even if that part of the act is invalid the rest of it is not.
9. ———: ———: **Local or Special Law.** The Inheritance Law of 1917 is a general and not a special or local law.
10. ———: ———: **Graduated: Unnatural Classification: Public Welfare.** The classifications made by the Inheritance Law of 1917, which exempts from the tax \$15,000 of decedent's property for the widow and \$5,000 for each child, and fixes a tax of one per cent on the balance up to \$20,000, and a tax of two per cent on the

State ex rel. McClintock v. Guinotte.

next \$20,000, and a tax of three per cent on the next \$40,000, and larger percentages, by a graduated scale, on larger amounts, is not unreasonable. The reasonableness of a classification is to be measured in the light of modern public welfare, and that may require a graduation of the tax in proportion to the amount of property given to the legatees or heirs by the State, which has the power to appropriate the whole of decedent's property upon his death. A law which classifies the recipients of the State's favor according to the amounts received is not an unreasonable classification.

11. ———: ———: **Taxation on Property: Uniform: According to Value: Public Purpose.** The Inheritance Law of 1917 is not an exercise of the taxing power of the State; but even if it be the exercise of the taxing power, it is not a tax upon property, but a tax upon the transmission or succession of property upon the death of the owner, and not being a tax upon property it does not violate the constitutional provision declaring that taxes can be levied only for a public purpose, or the provision that taxes shall be uniform upon the same class of subjects, or the provision that all property subject to taxation shall be taxed in proportion to value.
12. ———: ———: **Classification According to Burden.** There can be a class within a class, and a classification by an inheritance law of recipients of a decedent's property according to amounts received and kinship is not unreasonable. Property passes upon the owner's death to others only by the grace of the State, and if the burdens imposed as a condition of succession be graduated according to amounts received or relationships to him they do not constitute an unconstitutional classification, even though they be imposed by an exercise of the taxing power. But the provisions of the Constitution concerning taxation have reference to those burdens or taxes fixed by law which are recurrent at fixed periods, not to duties imposed which occur only once, and hence they are not applicable to what is ordinarily denominated an inheritance tax.

Certiorari.

WRIT QUASHED.

Beardsley & Beardsley, Martin E. Lawson, and John M. Atkinson, for appellant.

(1) The Inheritance Tax Act of 1917 is violative of Section 3 of Article 10 of the Constitution of Missouri in that said tax is (a) not uniform upon the same class of subjects, as it provides for a graduated or progressive tax on the same class of subjects, and (b) provides

State ex rel. McClintock v. Guinotte.

different exemptions on the same class of subjects. State ex rel. v. Switzler, 143 Mo. 287; State ex rel. v. Henderson, 160 Mo. 190; Knowlton v. Moore, 178 U. S. 1. c. 70; Cope's Estate, 191 Pa. St. 24; State ex rel. v. Ferris, 53 Ohio St. 314; Haggerty v. State, 55 Ohio St. 613; Ohio Laws 1894, p. 169; Allen v. Smith, 84 Ohio St. 292; Snell v. State Railway Company, 60 Ohio St. 269; Southern Gum Company v. Laylin, 66 Ohio St. 594; State v. Hamlin, 86 Me. 495; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 292; City of St. Louis v. Speigel, 75 Mo. 145; City of St. Louis v. Speigel, 90 Mo. 587; City of St. Louis v. Bowler, 94 Mo. 630; City of Independence v. Gates, 110 Mo. 374; Kansas City v. Whipple, 136 Mo. 475; Kansas City v. Grush, 151 Mo. 128; State ex rel. v. Ashbrook, 154 Mo. 375; State v. Bengsch, 170 Mo. 81; State ex rel. v. St. Louis, 216 Mo. 91; State v. Miksicek, 225 Mo. 561; State v. Broadnax, 228 Mo. 25; Levee District v. Railroad, 240 Mo. 614; State ex rel. v. Burton, 266 Mo. 721; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283. (2) Said Inheritance Tax Act of 1917 is violative of Section 43 of Article 4 of the Constitution of Missouri which provides that all revenue collected and moneys received by the State from any source whatever shall go into the Treasury, and the General Assembly shall have no power to divert the same or to permit money to be drawn from the Treasury except in pursuance of regular appropriations made by law, in that said act provides that the State Treasurer shall permit money to be drawn from the Treasury without appropriations first being made by law. Ex parte Lucas, 160 Mo. 218; State v. Schramm, 199 S. W. 194; Friend v. Levy, 76 Ohio St. 50; State ex rel. v. Walsh, 28 Wis. 549; State v. Bockstock, 136 Mo. 353; State v. Bengsch, 170 Mo. 114. (3) Said Inheritance Tax Act of 1917 violates Subsections 16 and 21 of Section 53 of Article 4 of the Constitution of Missouri which provides that the General Assembly shall not pass (a) any local or special law changing the law of descent or succession, or (b) any special law affecting the estates of minors or persons under disability. Re Cope's Estate,

State ex rel. McClintock v. Guinotte.

191 Pa. St. 24-25; Hager v. Walker, 128 Ky. 12; Exparte Lucas, 160 Mo. 230; State ex rel. v. Burton, 266 Mo. 720. (4) Said Inheritance Tax Act of 1917 violates Section 30 of Article 2 of the Constitution of Missouri and Section 1 of the Fourteenth Amendment to the Federal Constitution, in that said act deprives relators and other persons of property without due process of law. Thorpe v. Miller, 137 Mo. 231; Ferry v. Campbell, 110 Iowa, 290; Davidson v. Board of Admrs. of New Orleans, 96 U. S. 97; Embree v. Kansas City & L. B. Road Dist., 240 U. S. 242. (5) Said Inheritance Tax Act of 1917 violates Section 28 of Article 4 of the Constitution of Missouri, in that said Act (a) contains more than one subject, and (b) which subjects are not clearly expressed in its title. St. Louis v. Tiefel, 42 Mo. 578; State v. Miller, 45 Mo. 495; State ex rel. v. Miller, 100 Mo. 439; State v. Bronson, 115 Mo. 271; Lynch v. Murphy, 119 Mo. 163; State ex rel. v. Slover, 134 Mo. 10; Gabbert v. Ry., 171 Mo. 84; State v. Coffee & Tea Co., 171 Mo. 634; Ferguson v. Gentry, 206 Mo. 189. (6) Said Inheritance Tax Act of 1917 violates the uniformity clause of said Section 3 of Article 10 of the Constitution of Missouri, in that said act classifies all beneficiaries into five legislative classifications, which classifications are purely arbitrary and discriminatory. Kansas City v. Grush, 151 Mo. 135.

Frank W. McAllister, Attorney-General, *S. E. Skelley*, *George V. Berry*, *Thomas J. Cole* and *John T. Gose*, Assistant Attorneys-General, for respondent.

(1) History of inheritance taxation. Gibbon's Decline and Fall of the Roman Empire, pp. 133, 163 164; West on Inheritance Tax, p. 11; Dowell's History of Taxation in England, 148; State v. Alston, 94 Tenn. 674; Magoun v. Ill. Trust & Savings Co., 170 U. S. 283; State v. Hamlin, 86 Me. 495; Blakemore & Bancroft, Inheritance Taxes, ch. 4, p. 13; Ross, Inheritance Taxation, p. 17; Knowlton v. Moore, 178 U. S. 41; Matter of McPherson, 104 N. Y. 306; Pollock v. Farmers Loan

State ex rel. McClintock v. Guinotte.

& Trust Co., 158 U. S. 601; In re McKennan, 130 N. W. (S. D.) 33; Appeal of Nettleton, 76 Conn. 235; Review of Reviews, February, 1893; Maguire v. University, 271 Mo. 363. (2) Inheritance taxation from an economic standpoint. Max West, Monograph on Inheritance Tax, p. 189; Adam Smith, Wealth of Nations, Book 5, Chap. 2, Part 2; Mills, Principles of Political Economy, Book 5, Chap. 11, sec. 3; Minnesota Tax Commission Report, 1910; In re Morris, 138 N. C. 259; State v. Bazille, 97 Minn. 16; Magoun v. Ill. Trust & Savings Co., 170 U. S. 293; In re McKennan, 130 N. W. (S. D.) 38; Knowlton v. Moore, 178 U. S. 109; Blakemore & Bancroft, Inheritance Taxes, chap. 3. (3) The power of the General Assembly to levy an inheritance tax is an inherent power. Snyder v. Bettman, 190 U. S. 252; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 292; Booth v. Commonwealth, 130 Ky. 88; Matter of McPherson, 104 N. Y. 306; Eury v. State, 74 Ohio St. 448; Schoolfield v. Lynchburg, 78 Va. 372; State v. Dalrymple, 70 Md. 294; State v. Clark, 30 Wash. 439; In re Morris, 138 N. C. 259; State v. Lancaster, 4 Neb. 537; In re Joslyn, 76 Vt. 88; In re McKennan, 130 N. W. (S. D.) 33; Mager v. Grima, 8 How. 493; People v. Griffith, 245 Ill. 532; Appeal of Nettleton, 76 Conn. 235; State ex rel. v. Henderson, 160 Mo. 216; Ross, Inheritance Taxation, sec. 14, p. 20. (4) An inheritance tax is not a property tax. State ex rel v. Henderson, 160 Mo. 215; Knowlton v. Moore, 178 U. S. 41; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283; United States v. Perkins, 163 U. S. 625; Plummer v. Coler, 178 U. S. 115; National Safe & Deposit Co. v. Illinois, 232 U. S. 58; Scholey v. Rew, 90 U. S. 331; State v. Handline, 100 Ark. 175; In re Wilmerding, 117 Cal. 281; Brown v. Elder, 32 Colo. 527; Kochersperger v. Drake, 167 Ill. 122; McGhee v. State, 105 Iowa, 9; Booth v. Commonwealth, 130 Ky. 88; Succession of Kohn, 115 La. 71; State v. Hamlin, 86 Me. 495; State v. Dalrymple, 70 Md. 294; Minot v. Winthrop, 162 Mass. 113; Union Trust Co. v. Probate Judge, 125 Mich. 484; State v. Bazille, 97 Minn. 11; Gelsthorpe v.

State ex rel. McClintock v. Guinotte.

Furnell, 20 Mont. 299; State v. Vinsonhaler, 94 Neb. 675; Hartmann's Appeal, 70 N. J. Eq. 664; Matter of White, 208 N. Y. 64; Morris Estate, 138 N. C. 259; In re McKennan, 130 N. W. (S. D.) 33; State v. Alston, 94 Tenn. 674; In re Joslyn, 76 Vt. 88; Eyre v. Jacob, 14 Gratt. 429; White v. Tax Commission, 42 Wash. 360; Beals v. State, 139 Wis. 544; Kingsbury v. Chapin, 196 Mass. 533; In re Touhy, 35 Mont. 431; State v. Bullen, 143 Wis. 518; In re Kennedy, 157 Cal. 517; In re Macky, 45 Colo. 316; In re Speed, 203 U. S. 553; Humphreys v. State, 70 Ohio St. 67; Knox v. Emerson, 123 Tenn. 409; Attorney-General v. Stone, 209 Mass. 186; Blakemore & Bancroft, Inheritance Taxes, chap. 2; Ross, Inheritance Taxation, secs. 4 and 5; Gleason & Otis, Inheritance Taxation, pp. 1-11; Mager v. Grima, 8 How. 493. (5) Section 4 of Article 10 of the Constitution of Missouri, providing that all property subject to taxation shall be taxed in proportion to its value, relates only to a tax on property, and does not apply to excise taxation or taxes other than those on property. Massachusetts Bonding & Ins. Co. v. Chorn, S. W. Advance Sheets, April 24, 1918; Bankers' Life v. Chorn, 186 S. W. 682; Masonic Aid v. Waddill, 138 Mo. 628; Aurora v. McGannon, 138 Mo. 38; American Express Co. v. St. Joseph, 66 Mo. 675; Ward v. Board, 135 Mo. 309; State ex rel. v. Henderson, 160 Mo. 190; State v. Bixman, 162 Mo. 1; Glasgow v. Rowse, 43 Mo. 479; St. Louis v. Green, 7 Mo. App. 468, 70 Mo. 562. (6) Section 3 of Article 10 of the Constitution of Missouri, providing that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, is complied with when the tax operates alike upon all those similarly situated or in like circumstances. State v. McGannon, 138 Mo. 49; Masonic Aid v. Waddill, 138 Mo. 637; Pacific Express Co. v. Seibert, 142 U. S. 350; Bankers' Life v. Chorn, 186 S. W. 683; Kansas City v. Richardson, 90 Mo. App. 456; St. Louis v. Green, 7 Mo. App. 468; City v. Green, 70 Mo. 562; State ex rel. v. Henderson, 160 Mo. 216.

(7) Classification according to degree of relationship, discrimination between lineal and collateral relatives and strangers to the blood of the decedent, is now well recognized and firmly established as being within the power and discretion of the Legislature; and such classification and discrimination is held not to offend any constitutional rule of uniformity and equality. *Keeney v. New York*, 222 U. S. 536; *Estate of Wilmerding*, 117 Cal. 281; *Estate of Campbell*, 200 U. S. 87; *In re McKennan*, 130 N. W. 33; *Kochersperger v. Drake*, 167 Ill. 122; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 287; *Knowlton v. Moore*, 178 U. S. 41; *Estate of Magnes*, 32 Colo. 527; *Appeal of Nettleton*, 76 Conn. 235; *Billings v. State*, 189 Ill. 472, 59 L. R. A. 807; *Booth v. Commonwealth*, 113 S. W. (Ky.) 61; *State v. Hamlin*, 86 Me. 495, 41 Am. St. 569, 25 L. R. A. 632; *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. 475; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487; *State v. Bazille*, 97 Minn. 11, 6 L. R. A. (N. S.) 732; *State v. Vance*, 97 Minn. 532, 106 N. W. 98; *Drew v. Tift*, 79 Minn. 175, 75 Am. St. 446, 47 L. R. A. 525; *State v. Henderson*, 160 Mo. 190; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L. R. A. 170; *Thompson v. Kidder*, 74 N. H. 89; *Estate of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *Pullen v. Commissioners of Wake Co.*, 66 N. C. 361; *Hagerty v. State*, 55 Ohio 613; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178; *Eyre v. Jacob*, 14 Gratt. 422, 72 Am. Dec. 367; *State v. Clark*, 30 Wash. 439; *Nunnemacher v. State*, 129 Wis. 190, 9 L. R. A. (N. S.) 121; *Wallace v. Myers*, 38 Fed. 184, 4 L. R. A. 171; *In re Benton*, 234 Ill. 366; *In re Touhy*, 35 Mont. 431; *Dixon v. Ricketts*, 26 Utah, 215; *In re Fox*, 154 Mich. 5; *Commonwealth v. Randall*, 225 Pa. St. 197; *Beals v. State*, 139 Wis. 544; *Ross on Inheritance Taxation*, sec. 21; *Blake-more & Bancroft, Inheritance Taxes*, sec. 62. (8) The power and right of the Legislature to grant exemptions is now generally conceded. The right to make ex-

State ex rel. McClintock v. Guinotte.

emptions is involved in the right to select a subject of taxation. In re McKennan, 130 N. W. (S. D.) 33; Estate of Wilmerding, 117 Cal. 281; Estate of Stanford, 126 Cal. 112, 45 L. R. A. 788; Estate of Magnes, 32 Colo. 527; Appeal of Nettleton, 76 Conn. 235; Ferry v. Campbell, 110 Iowa, 290, 50 L. R. A. 92; State v. Hamlin, 86 Me. 495, 41 Am. St. 569, 25 L. R. A. 632; Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259; Union Trust Co. v. Wayne, 125 Mich. 487; Gelsthorpe v. Furnell, 20 Mont. 299, 39 L. R. A. 170; Pullen v. Commissioners of Wake Co., 66 N. C. 361; State v. Guilbert, 70 Ohio St. 229; State v. Alston, 94 Tenn. 674, 28 L. R. A. 178; Estate of Hickok, 78 Vt. 259; State v. Clark, 20 Wash. 439; High v. Coyne, 93 Fed. 450; Beers v. Glenn, 211 U. S. 477; Magoun v. Ill. Trust & Savings Bank, 170 U. S. 283; Booth v. Commonwealth, 130 Ky. 88; In re opinion of Justices, 79 N. H. 597; Commonwealth v. Randall, 225 Pa. St. 197; Beals v. State, 139 Wis. 544; In re Speed, 216 Ill. 23, 203 U. S. 553; In re Morris, 138 N. C. 259. (9) A progressive rate of taxation, or making the tax rate increase with the value of the estate transmitted, does not make a statute unconstitutional. Whether the progressive rate be applied to both lineal and collateral heirs and strangers, or to collateral heirs alone, or only to distant relatives and strangers, is a matter within the discretion of the Legislature. In re McKennan, 130 N. W. (S. D.) 33; Keeney v. New York, 222 U. S. 536; Estate of Magnes, 32 Colo. 527; Appeal of Nettleton, 76 Conn. 235; Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446; Union Trust Co. v. Durfee, 125 Mich. 487; State v. Bazille, 97 Minn. 11, 6 L. R. A. (N. S.) 732; State v. Vinsonhaler, 74 Neb. 675; Morris's Estate, 138 N. C. 259; State v. Clark, 30 Wash. 439; Nunnemacher v. State, 129 Wis. 190, 9 L. R. A. (N. S.) 212; Knowlton v. Moore, 178 U. S. 41; Tyson v. State, 28 Md. 577; Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283; Ross on Inheritance Taxation, sec. 26; Blakemore & Bancroft, Inheritance Taxes, sec. 64; In re Fox, 154 Mich. 5; State v. Guilbert, 70 Ohio St. 255. (10) The

Inheritance Tax statute does not violate the Fourteenth Amendment to the Federal Constitution providing for equal protection of the laws and due process of law. *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 293. (11) Section 12, Inheritance Tax Act, does not contemplate a refund by the treasurer in an unconstitutional manner. *Lowery v. School Trustees*, 140 N. C. 41. Section 12 provides for a mere detail in the administration of the law, and even though it were unconstitutional, it would not invalidate the entire act. *Union Trust Co. v. Durfee*, 125 Mich. 495; *In re Keeney*, 194 N. Y. 286; *Friend v. Levy*, 76 Ohio St. 50; *Blakemore & Bancroft, Inheritance Taxes*, sec. 37; *State ex rel. v. Henderson*, 160 Mo. 217; *Matter of McPherson*, 104 N. Y. 306. (12) The classification in the Inheritance Tax Act is not arbitrary and discriminatory. *Kochersperger v. Drake*, 167 Ill. 122; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 287; *Knowlton v. Moore*, 178 U. S. 41; *In re McKennan*, 130 N. W. 33; *In re Fox*, 154 Mich. 5; *Keeney v. New York*, 222 U. S. 536; *State v. Guilbert*, 70 Ohio St. 255; and, generally, authorities cited under Points 6, 7, 8 and 9 above.

GRAVES, J.—This is *certiorari* to the probate court of Jackson County. To our writ return has been made by certifying up the full record. The real point is the validity or non-validity of the 1917 Act of the Missouri Legislature, commonly called the Inheritance Tax Law, Laws of Missouri 1917, page 114. The title of the act reads:

“AN ACT providing for a tax on the transfer of gifts, legacies, inheritances, bequests, devises, appointments and successions; providing for its payment and collection, establishing and enforcing liens therefor; providing the method of procedure for determining the amount thereof and liability therefor and providing for suits to quiet title against claims of liens arising by reason thereof and to repeal Article 14, Chapter 2, of the

Revised Statutes of Missouri of 1909, entitled 'Collateral Inheritance Tax,' and all amendments thereto."

The probate court of Jackson County was proceeding under this Act of 1917, in the estate of Robert McClintock, deceased. The court appointed one John A. Kurtz to appraise and fix the clear market value of each interest in the estate, which was done.

By his will Robert McClintock, deceased, had divided all of his large estate to his wife, Mary H. McClintock, his son, Robert S. McClintock, and his two grand-daughters, all of whom are relators herein. The said Kurtz found the value of the interests and fixed the taxes as follows:

"(1) Robert S. McClintock, son, real estate of the value of \$100,000, personal property of the value of \$28,162.50, making a total value of \$128,162.50, and deducted therefrom, as a legal exemption, the sum of \$5000, and charged an inheritance tax against the remaining sum of \$123,162.50 at the rate of one per cent on the first \$20,000, after allowing said sum of \$5000 as a legal exemption, and two per cent on amounts from \$20,000 to \$40,000, and three per cent on amounts from \$40,000 to \$80,000, and four per cent on amounts from \$80,000 to \$200,000, thus assessing and fixing the total inheritance tax charged against the interest of said relator, Robert S. McClintock, in the sum of \$3,526.50; (2) Mary Agnes Keller, grand-daughter, personal property of the value of \$28,250, and deducted therefrom as a legal exemption the sum of \$5000, and charged an inheritance tax against the remaining sum of \$23,250, at the rate of one per cent on the first \$20,000, after allowing said sum of \$5000 as a legal exemption, and two per cent on amounts from \$20,000 to \$40,000, thus assessing and fixing the total inheritance tax charged against the interest of said relator, Mary Agnes Keller, in the sum of \$265; (3) Martha Agnes Keller, grand-daughter, personal property of the value of \$28,250, and deducted therefrom as a legal exemption the sum of \$5000, and charged an inheritance tax against the remaining sum of \$23,250, at the rate of one per cent on

the first \$20,000, after allowing said sum of \$5000 as a legal exemption, and two per cent on amounts from \$20,000 to \$40,000, thus assessing and fixing the total inheritance tax charged against the interest of said relator, Martha Agnes Keller, in the sum of \$265; (4) Mary H. McClintock, widow, real estate of the value of \$40,500, personal property of the value of \$24,868.69, making a total of \$65,368.69, and deducted therefrom as a legal exemption the sum of \$15,000, and charged an inheritance tax against the remaining sum of \$56,368.69, at the rate of one per cent on the first \$20,000, after allowing said sum of \$15,000, as a legal exemption, and two per cent on amounts from \$20,000 to \$40,000, and three per cent on amounts from \$40,000 to \$80,000, thus assessing and charging the total inheritance tax charged against the interest of said relator, Mary H. McClintock, in the sum of \$911.06, thus making the total inheritance tax charged against said estate of Robert McClintock, deceased, in the sum of \$4967.56."

The judgment of the probate court followed the recommendation of Kurtz, and it is this judgment which relators challenge here. They challenge this judgment and proceeding in the probate court, thus:

"Relators further state that said probate court was without any authority, power and jurisdiction in the premises, aforesaid, for the reason that said act providing for said inheritance tax, in pursuance of which said probate court proceeded in the premises, is unconstitutional, void and of no effect, because it is in conflict with and in violation of the Constitution of the State of Missouri and of the Constitution of the United States in the following particulars:

"(1) Section 30 of Article 2 of the Constitution of Missouri, which provides that no person shall be deprived of property without due process of law.

"(2) Section 28 of Article 4 of the Constitution of Missouri, which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title.

“(3) Section 43 of Article 4 of the Constitution of Missouri, which provides that all revenue collected and moneys received by the State from any source whatever shall go into the Treasury, and the General Assembly shall have no power to divert the same or to permit money to be drawn from the Treasury except in pursuance of regular appropriations made by law.

“(4) Subsection 16 of Section 53 of Article 4 of the Constitution of Missouri, which provides that the General Assembly shall not pass any local or special law changing the law of descent or succession.

“(5) Subsection 21 of Section 53 of Article 4 of the Constitution of Missouri, which provides that the General Assembly shall not pass any local or special law affecting the estates of minors or persons under disability.

“(6) Section 3 of Article 10 of the Constitution of Missouri, which provides that taxes may be levied and collected for public purposes only and that they shall be uniform upon the same class of subjects within the territorial limits of the authority levying such taxes.

“(7) Section 4 of Article 10 of the Constitution of Missouri, which provides that all property subject to taxation shall be taxed in proportion to its value.

“(8) Section 8 of Article 10 of the Constitution of Missouri, which fixes the rate of the state tax on property

“(9) Section 1 of the 14th Amendment of the Constitution of the United States, in that said act (1) deprives relators and other persons of property without due process of law; and (2) denies to relators and other persons within its jurisdiction the equal protection of the law.”

This suffices to state the case.

I. Before taking up the things urged against this law, it might be well to see just what the law is, in fact. Throughout it speaks of a tax on transfer of property. But the word “tax” has a broad **Inheritance.** as well as a restricted meaning. We must consider the act as a whole to get the legislative idea.

It is clear from a reading of this law that the law-making power was impressed with the idea that the right of inheritance was not an absolute right, but on the other hand was a right which might or might not be granted by the State. It is also clear that the Legislature recognized its power to change and modify the law as to descents and distributions, for we have no constitutional provisions restricting the law-makers in this regard. Whilst by the Constitution we are compelled to recognize certain common law rules, yet we are not compelled to recognize them after the law-makers of the State change or abolish them.

Inheritance of property is not an absolute or natural right, and is not a right which may not be abolished by the law-makers. We mean by this, that there is no constitutional provision in this State which would prohibit the law-making power changing or abolishing entirely the law as to descents and distributions. That we have changed these laws (and radically so) is made apparent by our decisions. [Perry v. Strawbridge, 209 Mo. 621.] If under the Constitution we can radically change such laws, we can likewise abolish them, and this on the theory that the right of inheritance of property is not a natural right, but one purely produced by the laws of the sovereign. In 9 R. C. L. p. 13, sec. 7, it is said:

“It has been asserted in a comparatively recent case, that the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the Legislature. It seems, however, that no authority can be found to support this view, which is contrary, furthermore, to that of all the historians of law and of all economic writers. Indeed, the entire body of the law of descent and distribution seems to have been built upon the opposite conclusion, viz., that the right to take property, either real or personal, by inheritance, is purely statutory, and it is said that all statutes regulating the descent and distribution of interstate estates may be considered as positive, and, in some degree, arbitrary rules, which

cannot be changed by the court in order to make them conform to its conception of right and justice in particular cases.”

The author has cited the numerous cases, which are practically all one way. The recent case to which he refers is that of *Nunnemacher v. State*, 129 Wis. 190. Even in the majority opinion of this case, at page 198, we find this admission:

“We are fully aware that the contrary proposition has been stated by the great majority of the courts of this country, including the Supreme Court of the United States. The unanimity with which it is stated is perhaps only equaled by the paucity of reasoning by which it is supported. In its simplest form it is thus stated: ‘The right to take property by devise or descent is the creature of the law and not a natural right.’ [*Magoun v. Ill. T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594.] In *Eyre v. Jacob*, 14 Gratt. 422, it is stated more sweepingly thus: ‘It (the Legislature) may tomorrow, if it pleases, absolutely repeal the statute of wills, and that of descents and distributions, and declare that upon the death of a party, his property shall be applied to the payment of his debts and the residue appropriated to public uses.’

“But it has been reserved for the Supreme Court of North Carolina to sweep away all natural property rights in a few terse sentences, which may well be quoted: ‘Property itself, as well as the succession to it, is the creature of positive law. The Legislature declares what objects in nature may be held as property; it provides by what forms and on what conditions it may be transmitted from one person to another; it confines the right of inheriting to certain persons whom it defines heirs; and on the failure of such it takes the property to the State as an escheat. The right to give or take property is not one of those natural and inalienable rights which are supposed to precede all government and which no government can rightfully impair.’ [*Pullen v. Commrs.*, 66 N. C. 361.]”

The learned judge who wrote that opinion writes interestingly upon the conceived natural right to inherit property, but frankly concludes that the courts are against him. From an early day this court has been against the doctrine of the Wisconsin court. See the outline of the origin of our laws as to descents and distribution, by SCOTT, J., in *Leakey v. Maupin*, 10 Mo. l. c. 370.

The right to inherit property is not a natural right, but a right conferred by the laws of the sovereign. It is not a constitutional right in our State. The sovereign may grant or withhold the right. The sovereign having the full power to withhold the right, may grant the right upon any conditions which it sees proper to impose, provided the conditions, so imposed, do not contravene constitutional provisions. The consensus of court views is thus expressed in 9 R. C. L. p. 14:

"As the right to take by descent is property only by reason of the fact that the law-making body has seen fit to make it such, the Legislature has absolute power to control the manner in which property shall descend and be distributed, subject, of course, to constitutional limitations, which, however, place no limit on the general Legislative control. Accordingly, when a man dies intestate the supreme authority of the law may give his personal property away according to its absolute will and pleasure, may enlarge the privilege of freedom from appropriation to the payment of debts, may impose conditions or burdens on a right of succession, or may even declare that on the death of a person his property shall be applied to the payment of his debts, and the residue appropriated to public uses. Similarly, the Legislature may, at will, change the laws of descent and distribution, subject only to the preservation of rights already vested by the operation of the prior law. Jurisdictionally, descent is entirely subject to the local regulation and control of the several States. The power of the Legislature with respect to the liability of the estate for the intestate's debts is considered elsewhere in this article."

What is said as to descent and distribution under laws granting such, applies to descents and distributions by instruments (such as wills) which take effect upon the death of the party executing the instrument.

The sovereign power which can close the avenues of descent and distributions, as expressed in previous laws (whether civil, common or statutory), can with equal propriety reach the laws as to wills. In other words, the State, unless prohibited by the Constitution thereof, can prohibit entirely the transfer of property by will. Having the absolute power to prohibit, it can, on the doctrine, that the whole covers all the lesser parts, grant the right, and place thereon restriction. And these restrictions are valid (whatever they may be) unless in them can be found some violation of other constitutional provisions. So that under the great weight of the authorities, we rule (1) that the taking of property by inheritance or by will is, not an absolute or natural right, but one created by the laws of the sovereign power. This court has so said. [State ex rel. v. Henderson, 160 Mo. l. c. 216.] (2) That this sovereign power (the State in this case) may foreclose the right absolutely, or it may grant the right upon conditions precedent, which conditions, if not otherwise violative of our Constitution, will have to be complied with before the right of descent and distribution (whether under the law or by will) can exist. And (3) that this right of the State to foreclose absolutely, or partially, the right to inherit, by law or will, is not strictly the exercise of the taxing power of the State, but the exercise of that other power of the State which is inherent in its sovereignty, which allows the State or the Nation, to say what shall be done with the property owned by the citizen, at the time of his death. No provision of the Missouri Constitution stays the free hand of our law-makers as to the disposition of property owned by a citizen at the time of his death. It can be appropriated by the State, if the law-makers so decree. It may be partially taken, if the law-makers so decree. It may be permitted to descend (by will or otherwise)

upon conditions precedent, if the law-makers so decree.

In this case the effect of the law is to permit the property of a deceased person to pass to others, rather than to the State, but upon the conditions in the law prescribed. It is not strictly the exercise of the taxing power at all. It is however, the exercise of a sovereign power, which has not been prohibited by the Constitution, for it is so recognized. But what we do mean is that laws which take possession of the property of a deceased person, and fixes conditions precedent upon the transfer thereof, are not necessarily the exercise of the taxing power at all.

The character of the law must be determined from its effect, rather than from the technical name which may be given thereto. [State v. Bengsch, 170 Mo. p. 81 and other cases determining whether a law was intended for a tax on property or otherwise.] After the passage of the Act of 1917, it is clear that the Legislature intended to limit the transfer of property from the estate of the deceased to others. It is clear that the whole property is placed in the hands of the custodian of the State, subject to the conditions precedent to the transfer.

Upon the whole we are firmly convinced that the law is not referable to the taxing power at all, but is referable to the power of the State to say what becomes of the property of a person, when death forecloses his right to control it. With this view of the case there is not much left therein. We shall, however, discuss the matter from other angles suggested in the briefs.

II. On the theory that the law is not the exercise of the taxing power, but of another and different sovereign power, the divers and sundry constitutional provisions as to taxation disappear from the case.

**Taxing
Power.**

This for the reason that these constitutional provisions are but limitations upon the exercise of the taxing power, and none other. But as said above, whilst these are our views, we will discuss the other

matters out of respect for learned counsel urging them, and in view of the fact that this court has heretofore discussed the question along such lines—ruling that a somewhat similar law did not fix a tax upon property, but that an obligation fixed on the transfer of property was not a tax upon property itself. [State ex rel v. Henderson, 160 Mo. 190; Maguire v. University, 271 Mo. l. c. 359.]

These cases do speak of the law as fixing a tax upon the transfer of property, and upon that phase of the case we will later give our views—not because we think either law is referable to the taxing power of the State, but for the reason assigned above.

The idea that such laws are the exercise of the taxing power of the State no doubt comes from expressions of the laws themselves, and because in them we find no direct repeal of statutes relative to descents and distributions, or wills. Statutes, however, may be repealed or modified by later statutes, which conflict therewith, and in this case we have a statute which imposes conditions precedent to inheritance, which clearly conflict with previous laws as to descents and distributions, and also the law as to wills. To illustrate, the present law as to descents and distributions does not contain any limitations upon the right, as is contained in the law now before us. In so far as the latter law conflicts with the former, it repeals it. So too as to the law of wills.

III. Before taking up this case upon the theory that it is a tax of some kind, and in following up the theory of the views expressed in our point one, supra, it is well to gauge the contentions of the relator to those views. In the statement are found the constitutional provisions that this law is supposed to offend. Of these for a moment.

Constitutional Questions.

(1) If the law is what we think it is, and what our paragraph one holds it to be, then Section 30 of Article 2 of the Missouri Constitution is in no way violated. This, because the law in question is but the exercise of

the sovereign power of the State, and cannot be said to be the taking of property without due process of law. Not only so, but the State has the right to say whether the heirs have any right to property of the deceased, and if the State in the exercise of its sovereignty says they shall have no such right or says that they shall have only a limited right, there is no such question as a failure of due process of law in the case.

(2) It is next suggested as a constitutional objection that Section 28 of Article 4 provides that no bill shall contain more than one subject, which shall be clearly expressed in the title. This is really the only constitutional dart that strikes at the position taken in our point one, *supra*.

It was evidently interposed upon the theory that we might conclude that the law under review repealed or modified in a way the laws as to descent and distributions and wills, and that the title to this bill did not so indicate. A sufficient answer to this view can be shortly stated. The title to this act we have set out in full. There can be no question that the law follows the title and is within the purview of the title. True it is that it does not in the title nor in the bill provide for a repeal or modification of the laws as to descent and distribution of the law of wills. The title clearly indicated just what the law-makers did, and this is sufficient. If the law as passed (being within the purview of the title to the bill) had the legal effect of repealing or modifying previous laws, that is a question for the courts to determine under the usual rules of statutory construction. One rule is, that if a later law conflicts with an earlier one, the later law operates to repeal or modify the earlier one to the extent of the conflict. So that if the law passed is fairly within the purview of the title to the bill it is a good law, and it then remains for the court to say whether such law repeals or modifies other existing laws. In this case the law passed was strictly within the purview of the title to the bill. We hold, however, that it modifies the law as to descent and distributions

and the law as to wills, which, as a court, we have a right to do.

(3) We are cited to Section 43 of Article 4 of the Missouri Constitution, which provides that no money shall be diverted from the State Treasury except by a proper appropriation bill. This question is not in this case under the pleadings and will not be passed upon now.

Relators do not place themselves in a position to question this portion of the act. Whether this portion of the act is valid or invalid does not interest them. But even if this portion of the act might be invalid, it does not follow that the whole act must fall. The section thus attacked is section 12 of the Act, which reads:

“When any tax shall have been paid erroneously to the State Treasurer it shall be lawful for him, on satisfactory proof of said erroneous payment, to refund and pay to the executor, administrator, or trustee, person or persons who paid the same, the amount of such tax so erroneously paid; provided that all applications for the refund of said tax shall be made within two years from the date of said payment.”

And also a part of Section 25, which reads:

“Such return of over-payment shall be made in the manner provided by Section Twelve of this act, upon the order of the court having jurisdiction.”

It will be observed that these provisions do not necessarily provide for a repayment without further legislative action, in the way of an appropriation.

But we must not, and do not, discuss this matter, because not within the purview of the instant case. Relators have not stated a case under these provisions, and we have no doubt, that, if found necessary, this portion of the act might be stricken out, and yet leave a valid law, which covers the case made by relators.

Paragraph 4, 5, 6, 7, 8 and 9 of the constitutional objections set out in our statement, can in no way be upheld under the views in our paragraph one. (a) The law is not a local or special law changing the law

State ex rel. McClintock v. Guinotte.

of descents and succession. It is, if anything, a general law. (b) Neither is it a local or special law affecting the estates of minors or persons under disabilities. It is a general law, and one within the sovereign power of the State to enact. Under the views expressed in our paragraph one, *supra*, it is not necessary to note the assignments, in numbers 6, 7 and 8 on constitutional questions. These refer solely to the taxing power of the State, and our views are that this law is not referable to that power.

Nor need we hardly mention the 14th Amendment of the Federal Constitution, as to equal protection under the law, and due process of law. These are not in the case in any view of it. These have been too often defined for repetition here. Nor can it be said that the classifications made are unreasonable under our rulings. In *State ex rel. v. Henderson*, 160 Mo. 216, it is said:

"It is insisted that this act makes an unnatural and unconstitutional classification. It will be observed that it is laid upon collaterals only, and exempts the lineals both ascending and descending, and the husband and wife and adopted children.

"The right of the Legislature to prescribe the right of descent and inheritance cannot be doubted. It is not a natural right. [2 Blackstone's Com., pp. 10 and 13; *Strode v. Commr.*, 52 Pa. 181; *State v. Hamlin*, 25 L. R. A. (Maine), 632; *Eyre v. Jacob*, 14 Gratt. 430.]

"The Legislature has seen fit to make this classification, and unless it is so arbitrary that we can say beyond a reasonable doubt that it transcends constitutional limitations, we are bound to accept it."

So also in *White v. Railroad*, 230 Mo. 287, we had under consideration the question of classification. In that case the question was a close one. Unreasonable classification was urged, but VALLIANT, J., in an opinion for our Court in Banc, in elegantly expressed views, which to those of us who knew him, visualize the man, committed this court to broad views upon the subject. He committed us to a view which requires us to look to the general welfare of the public in the

matter of classifications in law. In other words the reasonableness of the classes created by a law must be weighed in the light of modern day public welfare. This public welfare might require qualified owners of property to pay tribute, or have exemptions, in accordance with and in proportion to the amount of property given them by the State. For under our paragraph one, relations of one deceased only get the property by virtue of a gift (through law) of the State. Not only so, but as held in *State ex rel. v. Henderson*, *supra*, we can distinguish between degrees of relationship without making the classification unreasonable. In fact, what the State can do in its sovereign power can hardly be questioned, except upon constitutional grounds, and there are none here.

So that viewing the Act of 1917, from the angle suggested by our point one, and from the questions presented by the pleadings therein, it should be held valid, and we so hold it. These are our views, and cover the entire case, but the questions urged by counsel, on the theory that the law is referable to the taxing power of the State, we will take next. We do not think it referable to that power, and to our mind what we have heretofore written disposes of this case.

IV. Going now to the proposition that this law is the exercise of the taxing power of the State, how stands the case? We are not without some authority here, as well as elsewhere. We have held that the tax, if it be or shall be called a tax, is not a tax upon property. [*State ex rel. v. Henderson*, 160 Mo. l. c. 215; *Maguire v. University*, 271 Mo. l. c. 363.] In the latter case, *BOND*, P. J., traces the history of such laws, and closes the discussion by saying:

“The constitutional principle upon which this excise or duty rests is that it is not a tax upon property, but only on the transmission of property, either by operation of law, or wills or gifts, to take effect upon death. [*Ross*, *Inheritance Taxation*, p. 25, sec. 19.]”

It will be observed that the learned writer does not say that it is a tax within the usual construction of that term. He does emphasize the idea that it is a duty imposed by the State upon the transmission of property. He in fact rules what we have ruled in our paragraph one, *supra*. The general rule seems to be, that, although it be considered as a tax of some character, it can not be considered a tax upon property. Not only is this the general rule, but it is so announced in this State. So that in considering the questions urged against the law, conceding that the law is the exercise of the taxing power of the State, we must proceed upon the theory that it is not a tax upon property. This, because there is no dissent to that question in this State.

V. If it is not a property tax, as we have held, how stand the constitutional objections to the law? Under this proposition the first five points made in relators' petition (set out in full in the statement) may be eliminated, because the discussion hereinbefore made eliminates them here, as well as under the question then under discussion.

It is urged that the law violates Section 3 of Article 10 of the Constitution. This section says that taxes can be levied for public purposes only. There is no question in this case that the money arising from the enforcement of the present law (whether you call it a tax or something else) is used for public purposes. This section then further provides that the taxes so levied "shall be uniform upon the same class of subjects." Nor can there be a question as to the uniformity of the tax or imposition, under the classes, designated by the law. Each class fixed by the law carries the same burden. So that this constitutional provision is not violated. Whether the classification is a reasonable one may with propriety be urged. But that the classes as made by the law (each covering a given line of transmissions of property) and that the particular class (made by the statute) covers all in the class and fixes upon all of the class a uniform burden, can not be

gainsaid. The only question is as to the validity of the classification. We have held (in the collateral inheritance tax cases) that the making of collateral kin as a class, is not violative of law. [State ex rel. v. Henderson, 160 Mo. 190.] This, thus makes at least two classes to be recognized, direct and collateral kin. As a matter of public policy we have made those classes. But this is not all. In *White v. Railroad*, supra, the question of classification is fully considered. If there is a reason for the class, the Legislature has full authority to act. Is there reason for classifying interests in an estate of different values into different classes, although such interests may be held by persons of the same degree of relationship to the deceased? This is the concrete question. We have no hesitancy in answering the question in the affirmative. Burdens, to be charged to an inherited estate, or taxes if you see fit so to call them, are the general class. But in *White v. Railroad*, 230 Mo. 287, we held that there might be a reason for having classes within a class. In burdens, or taxes, if you please to so call them, of the character here involved, it must be noted that the property only passes by the grace of the State. It is upon the right of succession that the obligation is imposed. Throughout the Union graduated burdens of this character (dependent upon the amount inherited) have been recognized, and under such circumstances we should be loth to hold that such sub-classifications were not within the power of the law-makers. We hold that they are.

But beyond all this, when we consider the fact that Section 3 of Article 10 of the Constitution is but a part of the revenue and taxation scheme of the State, we are inclined to the view that it has reference solely to those burdens or taxes fixed by law which are recurrent at fixed periods, not to duties imposed which only occur once. These are our individual views, and under them, this provision has no application at all to the matter in hand. In these views we may be wrong, hence the discussion on the theory that the classification was not violative of any rule.

If, however, the burden to be assumed by the party to whom the privilege of succession is granted by the law, is not a tax upon property, as we have held, and as the courts generally hold, then the inapplicability of any portion of Article 10 of the Constitution is within the line of reasoning in the cases of *State v. Distilling Co.*, 236 Mo. l. c. 268, 277; *State v. Bixman*, 162 Mo. 1; and *St. Louis v. United Railways*, 263 Mo. l. c. 449.

VI. It is next urged that the law contravenes Section 4 of Article 10 of the Missouri Constitution. This too, is a part of our tax and revenue scheme. It simply says that "all property subject to taxation shall be taxed in proportion to value." If, as we have held herein, and heretofore held, that the imposition made by this law is not a tax upon property, this section can in no way apply. This section applies to a tax upon property, not upon a mere privilege granted as to the succession of property. We do not think that either Section 3 or 4 of Article 10 of our Constitution apply to this law. We have given our views as to Section 3 *supra*, and as to Section 4 we take it that a mere statement of the section answers the question.

What is here said applies with equal force to Section 8 of Article 10. This section likewise has reference to a tax upon property. We hold that this is not a tax upon property. In fact in our judgment all of Article 10 of our Constitution refers to a scheme and method of fixing taxes upon property, which taxes are recurrent at given periods, and not to other matters.

So that we rule, that under either theory of this case, the provisions of the law attacked, by the pleadings here, are constitutional and not subject to the objections made. The scheme and general purpose of the law is a valid one and should be upheld. To say that we cannot have a graduated imposition (or tax, if you please to so call it) upon the right to succeed to the property of a deceased person is so well established

elsewhere that we would be taking a step backward, to rule otherwise. We should not take such a step unless compelled so to do by clear and applicable constitutional provisions.

The question of unreasonable classification, whilst not constitutional (*White v. Railroad*, 230 Mo. l. c. 304), we have discussed, but feel that we might add a word.

The classification of subjects is a matter with the Legislature, and it is only when the courts can say that there is no reasonable basis for the classification that we should condemn the law upon that ground. Throughout the length and breadth of this Union graduated charges on the rights of succession have been imposed, and have been upheld by the courts.

If the State has the right to give, or to withhold the property of the deceased citizen, as the courts generally hold, we can see no reason for saying that a law which classifies the recipients of the State's favor according to the amount received, is not a reasonable classification. In cases of the kind here, what is there unreasonable about a classification which puts a recipient of a \$20,000 donation from the State in one class and the recipient of a \$10,000 donation in another class?

Upon the whole, considering only the questions by this record presented, the law challenged is a valid one, and the probate court of Jackson County was acting within legal lines when it did the things disclosed by the record returned to us in obedience to our writ of *certiorari*. It follows that its record should be sustained and our writ quashed. It is so ordered.

Bond, C. J., concurs in paragraph 4 and in the result; *Walker, Blair and Williams, JJ.*, concur; *Faris, J.*, concurs in result; *Woodson, J.*, concurs in all of the opinion except paragraph 4, as to which he expresses no opinion.

THE STATE ex rel. ELECTRIC COMPANY OF MISSOURI, Intervener and Appellant, v. JOHN M. ATKINSON et al.

In Banc, July 15, 1918.

1. **PUBLIC UTILITY: Discrimination in Rates: Free Light to City.** A provision in the franchise granted by a city to an electric light company whereby the company is required to furnish the city "without charge, lights for its offices and fire house, to the extent of one hundred kilowatt hours per month," worth \$40 per year, is not an unreasonable discrimination in favor of the city, in view of the fact that the city's annual account for street lights exceeds \$2,000.
2. ———: ———: ———: **Rest of Franchise Valid: Collateral Proceeding.** Even though the clause in a franchise whereby the company agrees to furnish electricity to the city for its offices and fire house is unlawful discrimination, it does not follow that the remaining portions of the franchise are void. If the city and company are willing to strike it out, another company, which failed to secure a franchise, should not be heard to complain. Nor could its invalidity be adjudicated in a collateral proceeding.
3. ———: **Public Service Commission: Judicial Powers.** The Public Service Commission is not a court. It is not invested with judicial powers. It has no power to adjudge a franchise granted by a county court to a company to do lighting throughout the county, to be invalid as to a city incorporated after the franchise was granted.
4. ———: **Franchise: Certificate of Convenience and Necessity: Right to Intervene.** A company which has been furnishing electricity to a city and its inhabitants, under a county franchise, granted prior to the incorporation of the city, is, upon the granting of a franchise by the city to another company and the application by that company to the Public Service Commission for a certificate of public convenience and necessity, entitled to be heard in the determination of the question as to whether the certificate shall be issued to applicant.
5. ———: **Competing Plants.** The policy of the Public Service Act is to substitute regulated monopoly for destructive competition. But the spirit of this policy is the protection of the public; the protection given to the utility is incidental. The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public.

State ex rel. v. Atkinson.

6. ———: ———: **High Rates.** Ordinarily high rates for electric light, being correctible through appropriate regulation by the Public Service Commission, do not call for the introduction of competitive conditions.
7. ———: ———: **Dependent on Circumstances.** The rule of regulated monopoly as to public utilities is not applicable without discrimination in every case where competition seeks to enter. It is a rule designed, as a practical system, to promote the public good, and whether its application will accomplish that purpose depends upon the particular facts in each case. And in this case the facts are reviewed, and it is *held* that the Public Service Commission did not transgress the meaning of the Public Service Act, in granting, to an electric light company, which had obtained a franchise from a city of 6500 inhabitants, a certificate of convenience and necessity to use said franchise, notwithstanding the objections of another company, which had been for some years supplying the city with light, but made no showing of its ability to continue to profitably do so at rates which are shown to be profitable to applicant.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate;*
Judge.

AFFIRMED.

Schnurmacher & Rassieur and *Perry S. Rader* for
intervener and appellant.

(1) The order of the Public Service Commission must be supported by substantial evidence; and if there is no substantial evidence to support its orders and findings that the construction of a competing plant and the exercise of a franchise granted to it by the city are necessary and convenient for the public service, a certificate of convenience and necessity cannot issue. *Laws 1913, p. 610, sec. 72; State ex rel. Wabash Railroad Co. v. Public Service Com., 196 S. W. (Mo.) 369; Potter v. Board of Public Utility Commissioners, 98 Atl. (N. J.) 30; West Jersey Railroad Co. v. Board of Public Utilities Commissioners, 87 N. J. L. 178; State v. Florida East Coast Ry. Co., 67 So. 910; State v. Great Northern Ry. Co., 130 Minn. 57; Erie Railroad Co. v. Board of Public Utility Commissioners, 87 N. J. L. 441.* No judgment for plaintiff of a trial court which

is not supported by substantial evidence can stand; and certainly there is nothing in the Public Service Act that requires a higher consideration of the orders of the Public Service Commission at the hands of this court than it accords to judgments of courts of general jurisdiction. (a) If this case is to be considered by this court as the judgments of circuit courts in law cases are treated, then the order of the Commission cannot stand unless it is supported by substantial evidence, for the judgment for plaintiff of a circuit court in a law case cannot stand, unless the finding of the court sitting as a jury, or the verdict of the jury, is supported by substantial evidence. *Cole v. Armour*, 154 Mo. 333; *State ex rel. v. Elliott*, 157 Mo. 609; *Uhrich v. Osborn*, 106 Mo. App. 492; *Colonial Trust Co. v. McMillan*, 188 Mo. 567; *Hethcock v. Crawford County*, 200 Mo. 176. (b) If the order of the Commission is to be tried and determined as an equity suit is considered by this court on appeal, as we believe the statute (Laws 1911, p. 642, sec. 111) requires, the order of the Commission cannot stand unless it is supported by substantial evidence, nor does it have any presumption of correctness, since the ultimate responsibility for the order rests upon this court. *Hoeller v. Haffner*, 155 Mo. 589; *Southern Com. Sav. Bank v. Slattery*, 166 Mo. 448; *Fitzpatrick v. Weber*, 168 Mo. 562; *Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551; *Lusk v. Atkinson*, 268 Mo. 118. (2) A duplication of plants is not the remedy for excessive rates. Full and ample power is vested in the Public Service Commission to "determine and prescribe just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute," and it is made the imperative duty of the Commission, upon its own motion or upon complaint, after a hearing, to determine and prescribe just and reasonable rates. And where there is an existing plant, with ample facilities to fully meet every reasonable demand for service, and it is doing so, with no complaint of any kind, competition and duplication of plants are

not the remedy for excessive rates, but such duplication means turmoil and cut-throat competition and loss of property, which must be borne by one or the other of the companies and in the end by the consumers themselves. *Laws* 1913, p. 605, sec. 69, sub-sec. 5; *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556; *In re Amsterdam J. & G. Railroad Co.*, 33 N. Y. Supp. 1009, 86 Hun. 578; *In Matter of Wood*, 99 App. Div. (N. Y.) 349; *Pond's Public Utilities*, p. 10; *Pond on Public Utilities* (1913), secs. 547, 548; *In Matter of Kings, Queens & Suffolk Railroad Co.*, 6 App. Div. (N. Y.) 245; *Calumet Service Co. v. Chilton*, 148 Wis. 334, 365.

A. Z. Patterson and James D. Lindsay for John M. Atkinson et al., respondents; *Amandus Brackman, Wilfred Jones and I. R. Kelso* for applicant.

Application of Western Power & Light Company.

(1) The petition or application filed by the Western Power & Light Company with the Public Service Commission, was sufficient to authorize the Commission to grant the certificate of convenience and necessity. That it was in strict compliance with the provisions of the Public Service Act is not questioned. (2) The county court of St. Louis County could not bind the city of Maplewood in its capacity as a city of the third class, in its exercise of the police powers given to it, in its right and power to establish and open up new streets, alleys and public grounds, and in its undoubted right by franchise to determine what company, if any, may occupy such new public streets, alleys and grounds. The Public Service Commission law does not, in any respect, deny to cities of the third class the right to enter into contracts for public lighting, but on the contrary, recognizes this right. *Babbitt v. Albion Elec. Lgt. & Power Co.*, P. U. Rep. Ann. 1915 F. p. 648. (3) Appellant asserts "that there is no basis, either in the law or the evidence, for the certificate of public convenience and necessity." We will not indulge in a lengthy discussion of monopoly

and competition for the very good reason that most of the cases which have been decided, where companies have been denied certificates of necessity, are cases where a new company is incorporated and desires to enter the field against a company already on the ground and operating under valid and statutory franchises, and any discussion found in those cases would not be controlling in a case like the one now under consideration. In the cases where the question of monopoly and regulation are discussed, all of the elements of ruinous competition are present, to some extent at least, while in the present case, every element of ruinous competition is lacking. If the appellant company had a valid and statutory franchise in the City of Maplewood, and was doing business in a limited field, and its facilities were sufficient to supply lights to the entire community at reasonable rates, and a new company desired to enter the field for the purpose of competing solely for the business of Maplewood, then it is clear that the field would not be large enough to sustain two systems of supply profitably, and the new company as well as the old company would both be compelled to go into bankruptcy, if permitted to compete, resulting ultimately, injuriously to the public; then, the Public Service Commission would deny to the new company a certificate of public convenience and necessity to exercise its franchise; but in a case like the one now under consideration, the Commission cannot find any of the necessary elements of ruinous competition.

BLAIR, J.—In Division Commissioner Ror filed an opinion as follows:

“On February 14, 1916, the Public Service Commission granted to the Western Power & Light Company, a corporation of St. Louis County, a certificate of public convenience and necessity to construct, maintain and operate an electric light and power system in the city of Maplewood in said county, under a franchise granted by said city. The Electric Company of Missouri, appellant herein, was an intervener in that

proceeding; and, after such certificate was ordered to issue, it proceeded by *certiorari* in the circuit court of Cole County to have the order of the Commission reviewed. The circuit court affirmed that order, and the cause is here on appeal.

"The city of Maplewood was incorporated as such in 1908. It is about eight or nine blocks wide from east to west, the streets and blocks being more artistic than regular in their direction and form. The eastern half is more compactly improved than the part further west, there being no appreciable difference in that respect between the eastern half and the adjoining portion of the city of St. Louis. The boundary between the two cities does not follow a street, but runs diagonally through lots and blocks. The population of Maplewood is about 6500.

"Before Maplewood was incorporated, and as early as 1892, the appellant, at first under a different name, began, and has since continued, to furnish the citizens of that county, including what is now the city of Maplewood, with electric light and power. So far as the evidence shows, the appellant has never owned a generating plant. The evidence does show that it procures its electricity from the Union Electric Light & Power Company, and that it furnishes to the latter company a different kind of electric current from Keokuk, the latter current not being used in Maplewood. Just what the relations are between appellant and the Union Company does not appear.

"The appellant, through a holding company, owns the gas business which furnishes gas to Maplewood and to the portions of the city of St. Louis adjoining Maplewood. It also owns a subway system.

"It is conceded that appellant never obtained any franchise from the city of Maplewood to do business in that city, but that it is continuing to operate under its original county franchise.

"At the time of the granting of the certificate to the Western Company by the Commission, the appellant was furnishing to the citizens of Maplewood and of other

cities and rural districts in said county light at the maximum rate of twelve cents per kilowatt hour. Just across the line in St. Louis, the Union Electric Light & Power Company, from which appellant gets its current, was furnishing it at a maximum of nine cents. There was a similar difference in the rates on gas in favor of St. Louis, it being furnished by appellant on both sides of the line. Appellant was at that time lighting about 643 residences and serving 144 commercial-light and power consumers in Maplewood. It was furnishing to that city about 150 street lamps of 60 candle-power each, at \$14.40 per annum for each lamp. Its business in Maplewood was about seventeen per cent of its total business in that county.

"It is conceded that the contract for street lighting made between the city and the appellant in 1910 for a period of five years was never submitted to an election for the approval of the votes of the city, and that it was not so submitted for the reason that both the city officials and the appellant were of the opinion that it would be defeated if it were submitted. It is also conceded by the parties herein that such contract was illegal for that reason.

"The subject of cheaper lights was discussed by the representatives of the city, and by the interveners herein, the Civic League of Maplewood and the South Maplewood Improvement Association. They applied to appellant for lower rates and received a good natured laugh in answer. They were told by appellant to apply to the Public Service Commission.

"The Western Power & Light Company had then been in business for about two years furnishing electricity in various cities in St. Louis County and in the rural portions of that county. It has a generating plant in that county. Application was made to it on behalf of Maplewood for rates, and the answer was made by the Western Company that it did not care to name any rates if they were sought merely for the purpose of being used against the appellant. It was assured that the application was not made for that

purpose. Competition bids were called for by the city with the result that the appellant offered to furnish the 60 c. p. lamp at \$14.40, while the Western Power & Light Company offered them at \$11.20. The latter offer was accepted, and a contract made in accordance therewith. It was a part of the agreement between the city and the Western Company that the latter should have the right to do a general electric business in the city. That company was given a franchise by the city to do such business. That franchise fixed ten cents as the maximum rate. Both the franchise and contract were approved by more than two-thirds majority at an election held for that purpose. Both the contract and the franchise were for a period of ten years. That franchise contained the following:

“ ‘Section 4. Grantee shall, without charge therefor, furnish free to the city, lights for its offices and fire house, to the extent of one hundred kilowatt hours per month.’

“And also this:

“ ‘Section 5. Nothing in this ordinance shall be construed as conflicting in any way with any State Laws now in force, or which may hereafter, during the term of this franchise, be in force, governing or regulating the conditions of light and power, service, or the rates to be charged for same by public utility companies in the State of Missouri.’

“The evidence tends to show (and it is not contradicted) that prior to and at the time of that election the appellant made a very active campaign to defeat the approval of such contract and franchise. It issued many circulars, and put many agents in the field for that purpose.

“On the hearing before the Commission the officers of appellant made no statement of the price paid by it to the Union Electric Light & Power Company for the current. They did testify that they had made a calculation, taking into consideration the necessary annual allowance to amortize the plant, and that the rate offered to the city by it could not be reduced without re-

ducing the net income below the point where it would pay interest on the investment.

"The president of the Western Power & Light Company testified that the service could be furnished by that company on the terms offered by it at a reasonable profit after making reasonable allowance for amortizing the plant. There was no evidence to the contrary.

"I. Appellant contends that the provision in the franchise granted to the Western Power & Light Company by which said company was required to furnish the city, without charge therefor, light for its offices and fire house to the extent of one hundred kilowatt hours per month, is a discrimination in favor of the city as against other consumers, and that such franchise is void for that reason.

"There are several reasons why that franchise should not, in this proceeding, be held void. In the first place, it does not appear how much electricity the city uses to light its offices and fire house. Whether it would amount to a hundred kilowatt hours per month is not shown. Respondents in their brief say that the service thus received by the city is worth about \$40 per annum. That assertion is not denied. In determining whether a discrimination is made in favor of the city, we must take a comprehensive view of the whole situation. The city has been paying annually to the appellant more than \$2000 for street lights, and would continue to pay about that amount under the new contract with the Western Power & Light Company. That fact must be considered along with the item of \$40. Now considering those two items together it would be entirely unreasonable to hold that such allowance of \$40 on the city's total account is, under the circumstances, a discrimination in favor of the city. In the second place, if it were an unlawful discrimination, it would not necessarily follow that it would render illegal the remaining portions of the franchise. Both the city and the Western Power & Light Company are here affirming in their joint brief that the remainder of the franchise

is valid though its provision under discussion be held void. If the parties to that franchise are satisfied with what is left of it after striking out that provision, there is no reason why the appellant should be heard to complain. It is generally conceded that the Public Service Commission is not a court. To say the least, it is not its primary business to determine legal questions, and especially it should not undertake to determine a legal question in which the party raising it is not concerned. We are sustained in this position by the appellant's brief herein. Its only franchise for doing business in Maplewood is a franchise granted by the county court before Maplewood was incorporated. Anticipating that the validity of its franchise would be attacked in this court for that reason, the able counsel for appellant, in their brief, say:

“The Electric Company of Missouri has a valid franchise for furnishing electricity to the inhabitants of the territory embraced within Maplewood, and that franchise is immune from attack in this proceeding.

“1. The Public Service Commission had no jurisdiction to determine the validity of the franchise granted to Intervener by St. Louis County, since that is a judicial question.

“Besides even if the jurisdiction of this court were original and the application had been made to it in the first instance, the validity of Intervener's franchise could not have been adjudicated, since that is a collateral matter. [Bank v. Rockefeller, 195 Mo. l. c. 42.]”

“We agree that the question as to the validity of such county franchise within the city of Maplewood is both judicial and collateral herein, and that it was not in the province of the Public Service Commission to inquire into it in this proceeding. The fact that the appellant was ‘on the ground’ furnishing electricity in Maplewood is sufficient to entitle it to be heard in determining the question as to whether a certificate of public convenience and necessity shall be granted to the appellant. On the other hand a franchise has been

granted by the city to the Western Power & Light Company, and that franchise has been approved at an election held for that purpose.

"The statute empowers the Public Service Commission to issue a certificate of convenience and necessity, or to refuse it, but does not empower it to adjudicate the question of the validity of the franchise.

"These two companies stand here, each with a franchise in its hand. We will treat them both alike, and, putting aside the question as to the legality of the franchises, will consider the only question properly before us, i. e. whether the certificate of public convenience and necessity was properly ordered to issue.

"II. This is an era in which we, in a large measure if not fully, realize a necessity for the conservation of energy and of natural resources. Such conservation is better secured by the regulation of public utilities than by their duplication. The Public Service Commission of this State has expressed itself on that question. In re Kansas City C. R. Co., 2 Mo. P. S. C. l. c. 417, it said:

'And the requirement of a finding of necessity, as well as of public convenience, further implies that if another utility is adequately rendering the service proposed, or is able and willing or may be required to do so, then the necessity would not exist and the certificate should be refused.'

"There is much to be said against the appellant in this case. It has no generating plant. The line separating Maplewood and St. Louis runs diagonally through streets, lots and blocks. East of that line the Union Electric Company serves its patrons under a maximum rate of nine cents. It turns its current over to appellant which serves its patrons west of that line under a maximum of twelve cents, demanding for the Maplwood service the same compensation which it gets in other smaller towns and in rural districts in the county. When called on by the city for lower rates it answered with a laugh, and with the sug-

gestion that the city go before the Public Service Commission. Rather than reduce its rates it preferred to spend its money in making an active campaign to defeat the contract and franchise awarded by the city to the Western Power & Light Company at an election called for that purpose. By that contract with the last named company the city saves \$3.20 on each street light, and the general service gets a maximum of ten cents instead of twelve.

“Appellant’s officers under oath say that their rates cannot be reduced without a loss of the reasonable income on the investment. That evidence is not refuted and we shall accept it as true. On the other hand, the officers of the Western Power & Light Company say that it can profitably furnish the service at the lower rates proposed by it. That evidence is not refuted and we shall accept it as true. Neither one of these companies has given us the basic facts on which their calculations were made. It may be that the appellant pays too much for its current. Whatever the cause may be, it is an unfortunate condition. The city and its citizens should not be compelled to pay more than the service is worth, and it is not worth more than it can be furnished for at a reasonable profit. If it can be furnished by the Western Power & Light Company on its proposed terms at a reasonable profit, the appellant has no right to any higher rates, although it cannot furnish it at the lower rates without a loss.

“Pond on Public Utilities, sec. 444, says: ‘While the interests of the owners of the property are to be considered they are not entitled to a greater return than it can normally earn under proper management. In other words, as between the two parties, the public or the consumer has the right to receive the service at its fair value or for what it is worth. The customer has the right to demand that no more shall be exacted from him for such service than the reasonable value of the service, and should not be subjected to the payment of unreasonable rates simply that stockholders

may earn dividends. If such a corporation can not maintain and operate its plants so as to pay satisfactory dividends on all its outstanding stock, this is a failure which the Constitution does not require to be remedied by imposing unjust burdens upon the public.'

'In *Covington & Lexington Turnpike Co. v. Sanford*, 164 U. S. 596, it was said: 'The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.'''

The opinion then concludes that: "As between regulation and competition in this case it seems clear to us that the former is the better remedy."

The opinion prepared by the learned Commissioner we regard as sound except in the conclusion reached. Let it be conceded that the act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental. The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public. There are other considerations, of course, but that mentioned forms the principal basis of the rule. A corollary is that, ordinarily, high rates do not call for the introduction of competitive conditions. These, generally, are said to be correctible through appropriate regulation by the Commission. It is to be kept in mind, nevertheless, that the rule is not a fine-spun theory, applicable without discrimination in every case where competition seeks to enter. It is held to be a practical system designed, as stated, to promote the public good and the particular facts in each case are to be regarded in applying it. In this case the Electric Company secures its current from another corporation operating chiefly in St. Louis. Its contract with that corporation is not in evidence. It does appear that the Electric Company cannot profitably supply Maplewood with current at rates which are shown to

be profitable to the Western Power & Light Company. This situation necessarily arises out of the contract rate between appellant and the Union Electric Company. The result of this is that a considerable portion of Maplewood must remain unlighted unless the present order is sustained or the contract rate for appellant's current can be reduced by appropriate proceedings before the Public Service Commission. Laying aside legal obstacles, if any, a very practical difficulty is met when we commence to consider the proceedings necessary to coerce a lower rate from the Union Electric Company in favor of appellant. The result would necessarily depend upon factors which, to some extent, have little to do with rate conditions in Maplewood. The delay would be considerable and the expense large. Meanwhile a considerable portion of Maplewood must remain in darkness. We do not say these conditions in an ordinary case would have much weight. In this case these two corporations are operating in numerous other places. The per cent of appellant's business which would be affected by competition thus introduced is quite small. It has no plant, in the ordinary sense, in Maplewood. It has no generating plant anywhere. Two-fifths of the poles it uses in Maplewood are those of other corporations. The probabilities that it will be injuriously affected are small. There is little likelihood the competition will prove "destructive." The increase in business in the whole territory served is ten per cent per annum. The needs of the city are great and pressing. Its funds are in such condition that it is not possible for it to pay appellant's rate and secure the lights necessary for its illumination. In these circumstances we cannot say that the Public Service Commission was wrong in issuing its certificate. That certificate may be issued if the Commission finds the improvement necessary or convenient. [Sec. 72, Laws 1913, p. 610.] We do not think this record justifies us in holding the Commission's finding was unwarranted.

The judgment is affirmed. All of the judges concur, except *Faris, J.*, dissenting, and *Bond, C. J.*, not sitting.

LUDLOW-SAYLOR WIRE COMPANY, Appellant, v.
LOUIS WOLLBRINCK, Assessor.

In Banc, July 15, 1918.

1. **LEGISLATIVE POWER: How Far Plenary.** The Legislature of a State, unless fettered by either the State or Federal Constitution, is vested, in its representative capacity, with the plenary power of the people, and can legislate at will. In consequence, no legislative act will be adjudged to be repugnant to the Constitution if any reasonable doubt of its constitutionality exists in the judicial mind.
2. **INCOME TAX: In Proportion to Value: Property.** A tax on income is not, in the constitutional sense, a tax on property, and hence the provision of the Constitution requiring that "all property subject to taxation shall be taxed in proportion to value" does not render invalid the Income Tax Law of 1917 which imposes a tax upon "the income of a taxable person." The word "property" in that clause was meant to include only those distinct classes of property which, because of their peculiar nature can be measured in value, become the object of taxation independent of the owner, and are susceptible by proper procedure, to lien or seizure for the enforcement of the tax. Prior to the adoption of the Constitution of 1875 the word "property," by judicial decision, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue, and when used in said Constitution it was not intended to include the usufruct of property, nor the earnings of physical or mental labor.
Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is property and a tax on incomes is a direct tax on property. Income is always paid in money or kind, that is, in real or personal property from which it accrues. Net income is the original and sole source of all existing private property. The very meaning of the word income is that it is "that gain which proceeds from labor, business, property or capital of any kind;" and this is substantially the definition given, in more elaborate words, in the Income Tax Act of 1917. A tax upon income accruing out of real or personal property is a tax upon such property itself; and an income arising from labor is money, which is property, and hence a tax on such income is a tax on property.
3. ———: ———: **Prior Definition: Adoption.** Words and their context used in a prior constitution and construed by the highest

court, when employed in a later constitution, are presumed to have been adopted with their adjudicated meaning, unless a contrary intention is manifest; and, hence, the word "property" used in the provision of the Constitution of 1875 which requires all property to be taxed in proportion to its value, having been used in similar sections of the two previous constitutions and having been construed by the Supreme Court not to include incomes, was used in the same sense and meaning in which, by judicial construction, it had been previously employed.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Constitution of 1865 contained no provision requiring taxes to "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," nor did it contain any provision conferring the power of taxation upon the Legislature, but assumed that such power was inherent; and while the Constitution of 1875 also assumed that the power of taxation was inherent in the Legislature, that power was carefully limited and restricted, among other things, by clauses (a) which required the tax to be uniform and (b) inhibiting the enactment of laws exempting any property from taxation except certain property specifically enumerated.

4. ———: ———: **Income as Intangible Property.** That income is property, and that a taxation of income from land or invested personality is, in effect, a taxation of the thing producing the income, does not render a statute imposing a tax on incomes violative of the provision of the Constitution which declares that all property shall be taxed in proportion to value. Those considerations do not alter the fact that incomes are distinguishable from the tangible or intangible property yielding them.

Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is not an intangible entity which the State may tax in a transmutation stage, after its production but pending its fixed investment in or transformation into some other sort of property.

5. ———: **Exemptions.** Since the limitations of the Constitution relating to *ad valorem* taxation upon property have reference solely to tangible and specific lands and personality, the excluded classes of property embracing incomes are not within its regulative provisions specifying what property shall be exempt from taxation.

Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that the Income Tax Act, which exempts from the tax incomes of unmarried persons to the extent of \$3,000 and of married persons to the extent of \$4,000, and imposes the tax upon all sums in excess of said amounts and on the entire income of business corporations, is violative of that clause of the Constitution which says that "all laws ex-

Wire Co. v. Wollbrinck.

emptying property from taxation" other than property used exclusively for religious worship, schools or purposes purely charitable "shall be void," and, besides, in so doing, violates the other clause which says that taxes "shall be uniform upon the same class of subjects."

6. —: **Uniformity: Classification: Graduation.** The Constitution does not prescribe uniformity of taxation as to any subject-matter of taxation except property in the constitutional sense, which does not embrace incomes. The provision of the Constitution which requires taxes to "be uniform upon the same class of subjects" recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. Since the Income Tax Act of 1917 classifies persons, corporations and entities, and provides a classification, as to amount, of the portion of the net income of each class of persons, corporations and entities which it makes subject to the tax, and further provides for the payment of an identical rate of taxation by each of the classes made subject to the burden, and requires each person, corporation or entity to pay the same tax which is to be paid by every other person, corporation or entity belonging to the class, it does not violate the constitutional rule of uniformity. The Legislature, by the express constitutional terms, had the power to create the classification of the distinct subjects contained in the act.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Income Tax Act is (a) a revenue measure purely; (b) the tax it imposes is not an occupation tax, because, while it taxes incomes derived from labor, trades, business and professions, it also taxes incomes from rents on land and interest from bonds, money loaned and all other income from either real or personal property; (c) it is not a license law, imposing a license tax, for no regulation or the exercise of the police power is involved; (d) it imposes a direct tax, in contradistinction to an indirect tax, because the tax is demandable and collectible from the identical person against whom it is levied; and (e) since income is property it is a direct property tax, or a direct tax upon property. Said act, therefore, violates the constitutional rule that taxes "shall be uniform upon the same class of subjects," because: (1) Incomes of unmarried persons less in amount than \$3,000 are not by it taxed at all; (2) incomes of married persons less than \$4,000 in amount are not taxed at all; (3) incomes from realty and personalty are, in effect, taxed at the rate of 35 cents on each \$100 thereof; (4) incomes from labor and professions are taxed at the rate of 50 cents on the \$100 thereof; (5) incomes of business corporations are taxed on the total amounts thereof, without any exemption whatever; and (6)

incomes from numerous alleged educational, fraternal, charitable, benevolent, agricultural and religious corporations and associations, not enumerated in the constitutional exemption list, are wholly exempt from the tax, and therefore (in which WILLIAMS, J., also concurs) these exemptions are violative of the clause of the Constitution which says that "all laws exempting property from taxation, other than the property above enumerated, shall be void," and the exemptions contravene the rule of uniformity prescribed by the Constitution. The word "uniform" used in the Constitution means "conforming to one rule, not varying or variable;" and whether an income tax is a property, or a license, or an occupation tax, the Constitution requires it to be uniform in its burdens upon the same class of subjects, that is to say, upon incomes; and no more permits a graduated tax on incomes than a graduated tax on property.

7. ———: ———: **In Excess of Property Taxes.** Section 32 of the Income Tax Law of 1917 is not unconstitutional because it creates a class consisting of persons whose income taxes exceed those paid on their real and personal property and imposes a tax on their incomes to the extent that their income taxation exceeds their property taxation. Persons belonging to such a class occupy a relation of support to the State reasonably distinguishable from others who pay taxes only on their income, and therefore such a classification does not contravene the constitutional requirement that taxes shall be uniform on the same class of subjects. [FARIS, WOODSON and WILLIAMS, JJ., dissenting.]
8. ———: ———: **U. S. Constitution.** The Income Tax Act of 1917 does not contravene the Fourteenth Amendment of the U. S. Constitution. The State has the freedom of a sovereign both as to the objects and methods of taxation.

Appeal from St. Louis Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

AFFIRMED.

Joseph W. Folk and Spencer & Donnell for appellant; *Alexander G. Cochran* of Counsel.

(1) Although the Missouri statute is taken almost bodily from the Federal Act of 1913, the fact that the validity of the Federal Act has been affirmed does not affirm the validity of the Missouri statute. *Brushaber v. Railroad*, 240 U. S. 1; *Pollock v. Farmers' Loan & Trust*

Wire Co. v. Wollbrinck.

Co., 157 U. S. 429, 557; License Tax Cases, 5 Wall. 462, 471; Knowlton v. Moore, 178 U. S. 41; State v. Frear, 148 Wis. 456; Campbell v. Shaw, 11 Hawaii, 112; Alderman v. Wells, 85 S. C. 507. (2) The Missouri Income Tax is a tax on property. (a) Income is property. Stratton's Independence v. Howbert, 231 U. S. 415; Opinion of Justices, 220 Mass. 624. (b) The Supreme Court of the United States has expressly decided that, so far as a tax is levied on income derived from either real estate or personal property as distinguished from income derived from professions and vocations, it is a tax on property, to-wit, a tax on the real estate or personal property from which the income is derived. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; Brushaber v. Railroad, 240 U. S. 1; Knowlton v. Moore, 178 U. S. 41; Flint v. Stone Tracy Co., 220 U. S. 107; Opinion of Justices, 220 Mass. 613; State v. Frear, 148 Wis. 456. (c) The Missouri law applies, not only to income from professions and vocations, but also to income from real estate and from personal property, and is therefore a tax on property. Sec. 2, p. 525, Laws 1917; Sec. 7, p. 528, Laws 1917. (3) Inasmuch as the Missouri income tax is a tax on property, the statute is unconstitutional because it violates Section 4 of Article 10 of the Constitution of Missouri, which provides that "all property subject to taxation shall be taxed in proportion to its value." Life Association v. Assessor, 49 Mo. 512; Hamilton v. County Court, 15 Mo. 3; State v. Bengsch, 170 Mo. 81; Parker v. Insurance Co., 42 La. Ann. 428; State v. O'Brien, 89 Mo. 631; Sec. 30, Declaration of Rights, Constitution of 1865; Constitutional Debates of Missouri, 1875, proceedings of 56th day, pp. 14, 15, 16, 24, 41, 45, 55, 58, 86, 87, 93, 142, 149, 178, 179, 184, 186, 187, 203, 204, 217; 57th day, pp. 27, 32; Sec. 8, p. 529, Laws 1917; Sec. 32, p. 538, Laws 1917; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; State v. Frear, 148 Wis. 45, 26 Am & Eng. Ann. Cas. 1147; Constitution of Wisconsin, Art. 8. (4) Inasmuch as the Missouri income tax is a tax upon property, the

statute is unconstitutional because it violates Sections 6 and 7 of Article 10 of the Constitution of Missouri, which strictly limit the power of the Legislature to exempt property from taxation, and provide that "all laws exempting property from taxation other than the property above enumerated shall be void." *State v. Bengsch*, 170 Mo. 81; *State v. Casey*, 210 Mo. 235. (5) The Legislature was without power to pass the Income Tax Law, which as above stated, is a tax on property, because it had previously provided for a 15-cent levy per \$100, which exhausted its constitutional authority. Sec. 8, Art. 10, Mo. Constitution: Sec. 11415, R. S. 1909; *Pollock v. Farmers' Trust Co.*, 157 U. S. 429, 158 U. S. 601. (6) Whether the Missouri income tax is technically a tax on property or not, it is violative of the Constitution of Missouri and therefore void because it lacks uniformity within the meaning of Section 3 of Article 10 of the Constitution. *Constitutional Debates of Missouri*, 1875: 56th day, pp. 6, 132, 178, 184, 185, 217, 231, 285, 286, 312, 313, 322; 57th day, pp. 2, 27, 32; *Constitution of 1865*, Section 30, Declaration of Rights; *St. Louis v. Spiegel*, 75 Mo. 145; *Kansas City v. Whipple*, 136 Mo. 475; *City of St. Louis v. Spiegel*, 90 Mo. 587; *Kansas City v. Grush*, 151 Mo. 128; *State ex rel. v. Ashbrook*, 154 Mo. 375; *State ex rel. v. Switzler*, 143 Mo. 287; *Judson on Taxation in Missouri*, pp. 128, 131; Sec. 1, Art. 9, *Constitution of Pennsylvania*; *In re Cope's Estate*, 191 Pa. 21; Sec. 6, *Laws 1917*, p. 527; *State v. Distilling Company*, 236 Mo. 219; *State v. Bixman*, 162 Mo. 1; *Gray on Limitations of Taxing Power*, sec. 1608; *Welton v. Missouri*, 91 U. S. 275; *Brown v. Maryland*, 12 Wheat. 425; *Opinion of Justice Field in Pollock v. Farmers' Loan & Trust Company*, 157 U. S., l. c. 607 and 596; Sec. 32, *Laws 1917*, 538; *Opinion of Justice Field in Pollock v. Farmers' Loan & Trust Company*, 157 U. S. l. c. 595 and 597; *State v. Miksicek*, 225 Mo. 561; *State ex rel. v. Plank Road Company*, 11 Wis., 40; *Alderman v. Wells*, 85 S. C. 507, 517; *St. Louis v. U. Rys. Co.*, 263 Mo. 449; *State v. Julio*, 129 Mo. 177;

Wire Co. v. Wollbrinck.

Campbell v. Shaw, 11 Hawaii, 112; Peacock v. Pratt, 121 Fed. 772. (7) Whether it is technically a tax on property or not the Missouri Income Tax Law is void for the reason that the act surrenders or suspends the power to tax corporations. Sec. 2, Art. 10, Mo. Constitution. (8) Inasmuch as the Income Tax Law of Missouri is a tax on receipts from interstate commerce, it is void as a tax on interstate commerce. *Leloup v. Port of Mobile*, 127 U. S. 640; *Galveston Ry. Co. v. Texas*, 210 U. S. 217; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292; *Oklahoma v. Wells Fargo Co.*, 223 U. S. 298; *Minnesota Rate Cases*, 230 U. S. 400; *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Kansas City Ry. v. Kansas*, 240 U. S. 231; *Lowney v. Crane Co.*, 245 U. S. 178; *Cooley on Taxation* (3 Ed.), p. 155; *Black on Income Taxes* (2 Ed.), p. 251; *U. S. Express Co. v. Minnesota*, 223 U. S. 344; *Atlantic Tel. v. Philadelphia*, 190 U. S. 1; *Baltic Mining Co. v. Massachusetts*, 231 U. S. 83; *St. Louis v. United Railways Co.*, 263 Mo. 387; Sections 1 and 7, Laws 1917, pp. 524, 528; *Express Co. v. City of Joseph*, 66 Mo. 675; *Erie Railroad Co. v. Pennsylvania*, 158 U. S. 431; *State Freight Tax Case*, 15 Wall. 232.

Frank W. McAllister, Attorney-General, *John T. Gose*, Assistant Attorney-General, *Charles H. Daues*, *H. A. Hamilton*, *Frederick N. Judson*, of Counsel, for respondent.

(1) The State Income Tax is not a property tax in the constitutional sense and the provisions of the Constitution relate only to *ad valorem* property taxation. *Glasgow v. Rowse*, 43 Mo. 479; *Black on Income Taxes*, (3 Ed.), p. 2, sec. 36; *Cooley on Taxation*, (3 Ed.), p. 10; 37 Cyc. 759-766; *Waring v. Savannah*, 60 Ga. 93; *Codman v. American Piano Co.*, 118 N. E. (Mass.) 344; *Woodruff v. Oswego Starch Co.*, 74 N. Y. Supp. 961, 77 N. Y. 23; *Drexel v. Commonwealth*, 46 Pa. St. 31; *Burlington v. Insurance Co.*, 31 Ia. 103; *Peacock v. Pratt*, 121 Fed. 772; *Alderman v. Wells*, 86 S. C. 507; *State ex rel. Bolens v. Frear*, 148 Wis. 456, L. R. A.

1915-B, 569; *Levi v. Louisville*, 97 Ky. 394; *Am. Express Co. v. St. Joseph*, 66 Mo. 675. (2) The State taxing power is inherent and incident to sovereignty, and is not a constitutional grant. *Glasgow v. Rowse*, 43 Mo. 479; *American Express Co. v. St. Joseph*, 66 Mo. 675; *Express Co. v. Seibert*, 44 Fed. 310, 142 U. S. 339; *Hannibal & St. Joe Railroad Co. v. Board of Equalization*, 69 Mo. 307; *State ex rel. v. Burton*, 266 Mo. 711; *Mutual Reserve Life Assn. v. Augusta*, 109 Ga. 73; *Scottish Union Ins. Co. v. Herriott*, 109 Ga. 606; *State v. Philadelphia Railroad Co.*, 45 Md. 61; *State v. North Central Railroad Co.*, 44 Md. 131, 37 Cyc. 732; *Parker v. Insurance Co.*, 42 La. Ann. 429; *Kansas City v. Whipple*, 136 Mo. 435; R. S. 1909, secs. 10471-10480; *City of St. Louis v. Sternberg*, 69 Mo. 301; *City of Aurora v. McGannon*, 138 Mo. 438; *City of St. Louis v. Baskowitz*, 201 S. W. 870; *City of St. Louis v. United Railways Co.*, 263 Mo. 439; *In re Sanford*, 263 Mo. 634; *City of St. Louis v. McCann*, 57 Mo. 307; *City of St. Joseph v. Ernst*, 94 Mo. 360; *City of Richmond v. Creel*, 253 Mo. 256. (3) "Direct Tax" and property tax distinguished. *Glasgow v. Rowse*, 43 Mo. 479; 37 Cyc. 714-759-766; *Pingree v. Auditor General*, 120 Mich. 95; *Drexel v. Commonwealth*, 47 Pa. 31; *New Orleans v. Fourchy*, 30 La. 910; *Levi v. Louisville*, 97 Ky. 394; *Cooley on Taxation* (3 Ed.), p. 10. (4) Federal and State taxation distinguished, and the rulings as to Federal taxation immaterial. *Income Tax Cases*, 157 U. S. 429, 158 U. S. 601; *Knowlton v. Moore*, 178 U. S. 41; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *State ex rel. Bolens v. Frear*, 148 Wis. 456. (5) The decision in *Glasgow v. Rowse* sustaining the constitutionality of the income tax in Missouri is decisive of the case at bar. This case has been repeatedly cited and followed as a leading case both in this State and elsewhere. *Glasgow v. Rowse*, 43 Mo. 479; *North Missouri R. Co. v. Maguire*, 49 Mo. 500; *American Express Co. v. City of St. Joseph*, supra; *City of St. Louis v. Sternberg*, 69 Mo. 301; *City of St. Louis v. Spiegel*, 75 Mo. 146; *City of St. Louis v. Bowler*, 94 Mo. 630; *City of St. Joseph v. Ernst*, 95 Mo.

367; *Kansas City v. Whipple*, 136 Mo. 479; *City of Aurora v. McGannon*, 138 Mo. 438; *State v. Bengsch*, 170 Mo. 109; *In re Sanford*, 236 Mo. 695; *City of St. Louis v. United Railways Co.*, 236 Mo. 449; *State ex rel. v. Burton*, 266 Mo. 719; *St. Louis v. Green*, 7 Mo. App. 473; *Kansas City v. Richardson*, 90 Mo. App. 456; *City of Fayetteville v. Carter*, 6 L. R. A. (Ark.) 509; *Short v. Maryland*, 80 Md. 392, 29 L. R. A. 404; *Cooley on Taxation* (3 Ed.), pp. 310-364-512; 37 Cyc. 732-759; *Black on Income Taxes* (3 Ed.), pp. 6 and 12. (6) Incidental duplicate taxation no legal objection to the income tax. 1 *Desty on Taxation*, p. 203; *Cooley on Taxation* (3 Ed.), sec. 387 et seq.; 37 Cyc. 579; *St. Louis Mut. Life Ins. Co. v. Board of Assessors*, 56 Mo. 506; *Woodruff v. Oswego Starch Co.*, 177 N. Y. 28; *City of St. Louis v. Baskowitz*, 201 S. W. 870; *Income Tax Act of 1865*. (7) *Income Taxation* is not novel, but has been enforced in all parts of the world for many years, and is now in force in many states of this country, and in foreign countries. *State ex rel. Bolens v. Frear*, 148 Wis. 456. (8) *State income taxation* is not dependent upon constitutional grant in the states where in force. *Commonwealth v. Werth*, 116 Va. 604. (9) *Supplemental and substitutionary state income taxation* must be distinguished. *State ex rel. Bolens v. Frear*, 148 Wis. 456; *Opinion of Justices*, 190 Mass. 607, 220 Mass. 624; *Codman v. American Piano Co.*, 119 N. E. (Mass.) 344. (10) *Classification and avoidance of duplicate taxation* involves the exercise of legislative discretion. *State ex rel. Bolens v. Frear*, 148 Wis. 456; *Pacific Express Co. v. Seibert*, 142 U. S. 339. (11) There is no lack of uniformity in the act, and its classification is in accord with the necessary and universal incidents of this form of taxation. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Clark v. Titusville*, 184 U. S. 329; *Bells Gap R. R. Co. v. Pennsylvania*, 134 U. S. 233; *Merchants Bank v. Pennsylvania*, 167 U. S. 461; *Simpson v. Hopkins*, 82 Md. 478; *Commissioners of Pa. v. Canal Co.*, 123 Pa. 594; *Aldermen v. Wells*, 85 S. C. 507; *State ex rel. Bolens v. Frear*, 148 Wis. 456; *City of Aurora v. Mc-*

Gannon, 138 Mo. l. c. 49. (12) There is no basis whatever for the charge of discrimination between objects of the same class. The debates of members in constitutional conventions and legislative assemblies are inadmissible in determining the meaning of language adopted. *United States v. Union Pacific R. Co.*, 91 U. S. 78; *Freight Association Case*, 166 U. S. 318; As to the construction of Section 3 of Article 10 of Constitution, see *St. Louis v. United Railways Co.*, 263 Mo. 449; *Kansas City v. Richardson*, 90 Mo. App. 455; *St. Louis v. Green*, 7 Mo. App. 468, 70 Mo. 562; *Glasgow v. Rowse*, 43 Mo. 489; *St. Louis v. Sternberg*, 69 Mo. 302. (13) The provisions of Section 32 are reasonable and in accord with the precedents of other states. (14) There is no basis whatever for the contention of interference with interstate commerce. The receipts of business are not taxed as such, but after they become part of the income whether of residents or non-residents. No case is cited or can be found where a general income tax has been adjudged to interfere with interstate commerce. *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 226; *United States Glue Co. v. Oak Creek*, 161 Wis. 211; *Peck v. Lowe*, 234 Fed. 125; 12 *Corpus Juris*, 114; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *American Mfg. Co. v. St. Louis*, 270 Mo. 40. (15) There is no violation of due process of law, or equal protection of the laws under the Fourteenth Amendment. *Davidson v. New Orleans*, 96 U. S. 97; *Bells Gap Railroad Co. v. Pennsylvania*, 134 U. S. 233; *Michigan Central Railroad Co. v. Powers*, 201 U. S. 245; *Pacific Express Co. v. Seibert*, 142 U. S. 339.

BOND, C. J.—I. Plaintiff, a business corporation, during the last half of the calendar year of 1917, earned a net income subject to taxation under an act of the Legislature approved April 12, 1917 (Laws 1917, p. 524, et seq.). Being cited to make a return of its said income, it refused, and brought this suit to enjoin the enforcement of said act as being violative of the State and Federal constitutions, making the assessor of the city of St. Louis a party defendant.

A general demurrer to the petition was sustained; whereupon, plaintiff not pleading further, a judgment dismissing its petition was rendered, from which this appeal was prosecuted.

II. The Federal Act of 1913, taxing incomes, was sustained after an amendment of the Constitution of the United States which excluded "taxes on incomes," however derived, from the effect of a prior ruling of the Supreme Court of the United States holding that such taxes should not be laid without apportionment among the several states. [Brushaber v. Un. Pac. Ry., 240 U. S. 17 et seq.; Pollock v. Farmers' Loan & Trust Company, 157 U. S. 1. c. 581; s. c. 158 U. S. 1. c. 637.] The Sixteenth Amendment of the Constitution of the United States, permitting Congress to levy income taxes without apportionment, was a reversal, by organic law, of the ruling of the Supreme Court of the United States to a contrary effect, which had only been made in the first instance by a bare majority of the justices of that court against the weight of the dissent of the present Chief Justice and three associate Justices. The Federal Income Tax, thus upheld, is the copy from which the various provisions of the act of the Missouri Legislature were "almost bodily" taken.

The decision of the Supreme Court of the United States, that the Act of Congress taxing incomes was (after the passage of the Sixteenth Amendment of the Federal Constitution) constitutional, is not an authority touching the contention, that the Act of the Missouri Legislature now under review is in violation of the Constitution of the State; since the provisions of the two Constitutions with reference to taxation are not the same. But that decision of the Supreme Court of the United States is persuasive authority that the various provisions of discrimination and classification common to the two acts are not in and of themselves obnoxious to the "due process" clause of the Federal Constitution, since it was held that the Federal act did not offend that safeguard in the Federal Constitution.

The pivotal points presented by this appeal are, therefore, whether the Act of the Missouri Legislature had overridden the Constitution of the State in the various respects claimed on behalf of plaintiff below and appellant here.

Prefatory to a discussion of these, it is well to note the true function of the Legislature as the representative of the people, in the enactment of laws for their government, and its true relation to the Constitution of the State. That it is vested, in its representative capacity, with all the primary power of the people, unless fettered by the Constitution, is a proposition which is the corner stone of our State government, and one whose stability is unquestionable, and which has been enunciated by this court whenever the relation of the Legislature to the Constitution was held in judgment. This greater power and amplitude of action is a characteristic distinction between the Legislature, having full authority as the direct representative of the primary power of the people to enact any and all laws when not restrained by the Constitution, and the Congress of the United States, whose authority to act is confined to the terms of the grant thereof contained in the Federal Constitution.

The government of this State is a representative republic in which all the power to make laws in the name and with the authority of the its constituent elements—its citizens *en masse*—is lodged in the temporary Legislature, subject only to the restraining clauses of the constitutions of the State and Nation. Upon this principle is founded the inherent power of that body to legislate at will on any subject and to any extent when, in so doing, neither the State nor the national Constitution is overridden. [U. S. Glue Co. v. Town of Oak Creek, 38 U. S. 499; Pitman v. Drabelle, 267 Mo. l. c. 84; Harris v. Bond Co., 244 Mo. l. c. 687; McGrew v. Paving Co., 247 Mo. l. c. 570; Ex parte Roberts, 166 Mo. l. c. 212; State ex rel. v. Pub. Serv. Com., 270 Mo. l. c. 559.]

As an obvious sequence of the power thus vested in the Legislature, the rule is established, in dealing

with constitutional restrictions, that they shall not be held to apply, if any reasonable doubt as to their repugnancy to the act under review, can exist in the judicial mind. Under the guidance of these principles, it becomes necessary to inquire in what manner and to what extent the Constitution has restrained the power of the Legislature in the vital matter of providing by taxation for the support of the government of the State. The particular provision of the Constitution relied on to support the errors assigned on this appeal are Sections 2, 3, 4, 6, 7, and 8 of Article 10 of the Constitution of 1875.

The appellant contends that the act under review (Laws 1917, p. 524, et seq.) in taxing incomes, thereby imposed a tax on property in contravention of Section 4, *supra*, in that by the terms of the act

**In Proportion
to Value.**

the tax was not laid in proportion to value.

This precise point, under a substantially similar provision of the Constitution then in existence, was presented for adjudication in *Glasgow v. Rowse*, 43 Mo. 479, and thus dealt with by WAGNER, J., in an opinion concurred in by BLISS and CURRIER, JJ. In disposing of it the court said:

“The power to tax rests upon necessity, and is inherent in every sovereignty. The Legislature of every State possesses it, whether particularly specified in the Constitution as a grant of power to be exercised or not. In reference to taxation, the Constitution is not so much to be regarded a grant of power as a restriction or limitation of power. . . .

“There are three general classes of direct taxes: capitation, having effect solely upon persons; *ad valorem*, having effect solely upon property; and income, having a mixed effect upon persons and property.

“The argument of the plaintiff’s counsel proceeds on the hypothesis that every species of tax comes within the constitutional prohibition. This is a mistake. The whole practice of the State has been different, and it has never been challenged, nor could it be, on legal principles.

“The statutes provide for a poll tax, which is in violation of the *ad valorem* rule, and is unequal, yet it is clearly within the Constitution. A license is imposed on shows, peddlers, auctioneers, dram-shops and billiard tables, all of which taxes are in violation of the *ad valorem* principle, but not therefore unconstitutional. The taxes imposed are uniform as to the particular classes, but not in proportion to the taxes assessed on other property.

“The Constitution enjoins a uniform rule as to the imposition of taxes on all property, but does not abridge the power of the Legislature to provide for a revenue from other sources. It was intended to make the burdens of government rest on all property alike—to forbid favoritism and prevent inequality. Outside of the constitutional restriction, the Legislature must be the sole judge of the propriety of taxation, and define the sources of revenue as the exigency of the occasion may require. The income tax was uniform and equal as to the classes upon whom it operated; it did not come within the meaning of the term ‘property’ as used and designated in the Constitution, and I think it was not in conflict with any provision of that instrument.” [Glasgow v. Rowse, 43 Mo. l. c. 489, 490, 491.]

The reasoning and conclusion of the court in the above case has never been disapproved in this State and has been extensively cited and approved in other states and in text-books, as shown in the brief of respondent. It is predicated upon a distinction made by the court as to the application of the term “property” used in the Constitution. In law and in the broadest sense “property” means “a thing owned,” and is, therefore, applicable to whatever is the subject of legal ownership. It is divisible into different species of property, including physical things, such as lands, goods, money; intangible things, such as franchises, patent rights, copyrights, trade-marks, trade names, business goodwill, rights of action, etc. In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be

protected by law. The court held, in effect, that in directing, as the Constitution does, that taxes on property should be levied according to value, reference was intended to be made to other species of property than that which a person has in his income; that the Constitution did not abridge the power of the Legislature to provide revenue by a taxation of income; that its command was directed to other and distinct classes of property which (on account of their peculiar nature *could be measured in value*) become the object of taxation *independent of the owner*, and are susceptible, by proper procedure, to lien or seizure for the enforcement of the tax. The court held that it was property having such a nature and characteristics, and not the mere usufruct of such property, nor the earnings of physical or mental labor, which was referred to in the clause under review and intended thereby to be subjected to taxation according to its value. [City of St. Louis v. Spiegel, 75 Mo. l. c. 146.] In support of this reasoning it is said in Black on Income Taxation (3 Ed.), p. 41, sec. 36:

“A tax on incomes is not a tax on property, and a tax on property does not embrace incomes, . . . For the same reason a tax laid on incomes is different from a tax laid on the property out of which the income arises, and although a statute may tax land at a different rate from that imposed on incomes, it is not therefore in conflict with a constitutional provision *that taxation on all species of property must be uniform.*” (Italics ours.)

The ruling of the court is also in keeping with what is said in 37 Cyc., p. 759, 6:

“A tax may be levied on income derived from property in the shape of rent or otherwise, although the property yielding the income is also subjected to taxation; and this does not violate the rule against double taxation, because *the two interests or species of property are distinct and severable.*” (Italics ours.)

In consonance with these distinctions the court held, in *Glasgow v. Rowse* (43 Mo. supra) that the term "property" in the Constitution did not apply to that species of ownership enjoined by the possessor of an income, and hence the Legislature was no more restricted in taxing incomes than it or its subordinate agencies are restricted in laying occupation and other taxes relating to the activities or personalty of the individual taxed; indeed, the fact that the act in question is a tax upon the *owner* of an income is distinctly recognized and stated in Section 2 of the act, which uses these words; "the net income of a *taxable* person", (italics ours) defining it. It may be that the construction of the word "property" which has appeared as definitive of the subject of *ad valorem* taxation in all of the three constitutions of this State when originally made, was not in full accord with the broadest possible meaning of that term, in that literally it might include every species of property. But that was not a compellable view, and the restricted construction (which excluded from its purview personal earnings and incomes) had been affixed to this term six years prior to the adoption of the Constitution of 1875 and the principle of that construction has since been applied in sustaining taxes of a similar nature, although levied without proportioning the taxation to the value of the thing taxed. Instances are: *Express Co. v. City of St. Joseph*, 66 Mo. 675, which was a case of the taxation of the gross receipts of an express company; *Kansas City v. Whipple*, 136 Mo. l. c. 478, in which the same principle covers poll taxes; *City of St. Louis v. Sternberg*, 69 Mo. l. c. 301, and *City of Aurora v. McGannon*, 138 Mo. 38, license and occupation taxes; *City of St. Louis v. McCann*, 157 Mo. l. c. 301, real estate agents, and *City of Richmond v. Creel*, 253 Mo. l. c. 257, trade and professional taxes. This distinction has been clearly noted by WALKER, J., in a recent case. [See *St. Louis v. United Rys. Co.*, 263 Mo. l. c. 449.]

It is apparent, therefore, that when the Constitution of 1875 was adopted, the word "property" as the basis

for taxation, proportioned to value, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue. The rule is firmly settled that the adoption in a later constitution of the words and context of another, which had been construed by a court of last resort, is presumed (in the absence of a contrary intention) to have been done to give the adopted words their adjudicated meaning. [6 R. C. L., p. 54, sec. 49, and cases cited.] It was the evident intent, therefore, of the Constitution of 1875, Section 4, *supra*, to use the word "property" in the same sense and meaning which it had been held to carry when used in a similar section in two prior constitutions. [Jenkins v. Ewin, 8 Heisk. 456; 12 Corpus Juris., 706, and cases cited under note ten; Sanders v. Anchor Line, 97 Mo. l. c. 30, 31; Ex parte Durbin, 102 Mo. l. c. 103.]

III. The cases from other jurisdictions cited in appellant's brief, holding that income is property and that a taxation of income from land or invested personalty, is, *in effect*, a taxation of the thing producing the income, do not militate in any sense against the conclusions expressed herein. That income is property because it is an ownable thing, is a matter of simple apprehension which has been affirmed under the definition of property above stated. That it is, "in effect," a taxation of the labor or capital which produced it, may be conceded, since by reaction it affects the value of the thing or things from which it is derived. But none of these considerations alter the fact that incomes are distinguishable from the tangible or intangible property yielding them, nor do they affect the established law in Missouri, that incomes are thus connoted by our Constitution and decisions. These recognize incomes as one of the classes entering into the concept of property not required to be taxed in proportion to value, and, therefore, not falling within the designation of property which the Legislature is forbidden to tax except in that way; and (as a conse-

quence of the plenary power of that body to raise revenue at will, absent a constitutional prohibition) falling wholly within the scope of the authority of the Legislature to impose taxes for the sustenance of the State without measuring its impose by the value of the thing taxed. Taxation of incomes, therefore, does not offend Section 4 of Article 10 of the Constitution of 1875.

IV. From what has been said as to the division of "property" into its component classes and the limitation of that term under the Constitution to tangible **Exemptions.** and specific lands and personalty as the basis for taxation *ad valorem*, it follows that the excluded classes of property embracing incomes, etc., are not within the regulative provisions of the Constitution (Secs. 6, 7, Art. 10) specifying what "property" shall be exempt from taxation.

Neither are the revenues proposed by the present act measured by Section 8 of Article 10, since that provision also relates to the limitation "of the tax **Rates.** on property," which term, as has been shown, whenever used in the clauses of the Constitution, does not embrace incomes. Indeed, the only contention of the learned brief for appellant as to the application of Sections 6, 7, and 8 of Article 10, is predicated upon the theory (which has been shown to be untenable under the settled construction of that term in this State) that the word "property" does embrace incomes.

V. It is, however, further insisted by appellant that "whether the Missouri income tax is technically a tax on property or not," it is a void enactment because not uniform as required by Section 3 of **Uniformity of Taxes.** Article 10 of the Constitution. Realizing the *cul de sac* into which that position runs on account of the clear, distinct and emphatic statement of the rule by this court In Banc that Section 3 of Article 10 of the Constitution does not proscribe uniformity as to any other subject-matters of taxation, except property in the constitutional sense affixed to

that term (*St. Louis v. United Rys.*, 263 Mo. l. c. 449), appellant insists that the ruling in question is *obiter* and error.

Without for a moment conceding this attack upon the ruling in question to be sound or correct, and for the argument only, taking it for granted that Section 3 of Article 10 of the Constitution is applicable to any and all of the subjects of taxation which the Legislature or its agencies may employ for the purpose of raising revenue, still, there is no merit whatever in the contention of appellant that the section in question is violated by the provisions of the Income Tax Law of Missouri now under review.

The Constitution (Section 3, Art. 10) provides "taxes may be levied and collected for public purposes, only. They shall be uniform upon the *same class of subjects*," etc. By necessary implication this constitutional provision recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. In the Missouri act under review, persons, corporations and entities are distinguished and classified. The act also provides a classification as to the amount, of the portion of the net income of each class of persons, corporations or entities, which is subject to taxation therein. The act further provides for the payment of an identical rate of taxation upon each of the classifications of income subject to its burden, and that each person, corporation or entity shall pay the same tax which is paid by every other person, corporation or entity belonging to the same class. That the Legislature had the power to create such classification is implied by the *very terms* of the provision of the Constitution (Sec. 3, Art 10) that taxes thereunder shall be uniform upon the same class of subjects. Necessarily this language would be meaningless unless interpreted to empower the Legislature to create distinct classes of "subjects." In the act under review it is not even contended (conceding the power to levy the tax) that

the provisions distinguishing the persons and grading the tax to be paid in accordance with such distinctions, are not founded in reason, in justice and for the utility of the public—the true criteria which should govern all legislative action. Indeed the essential justice of the various classifications of the act seems to be evident. Practically identical gradations of tax, classifications of persons, etc., are contained in the Federal act which is the pattern of the Missouri law, and are set forth in the discriminations found to exist in the acts of many other states of the Union and the most enlightened nations of the world.

Independently, therefore, of the application of the rule, which would excise the subject-matter of the Missouri act from the control of Section 3 of Article 10 of the Constitution (*St. Louis v. U. Rys. Co.*, 263 Mo., *supra*), the classifications and gradations of incomes subject to tax under the act under review were within the proper cognizance of the Legislature, which had unrestricted power to enact it under the settled construction of the relevant clauses of the Constitution by the Supreme Court of this State.

Neither can we assent to the contention of appellant that Section 32 of the act in question is violative of Section 3 of Article 10 of the Constitution. The Legislature might well create a class consisting of persons whose income taxes exceeded those paid on their real and personal property; for the reason that persons belonging to such a class occupy a relation of support to the State, reasonably distinguishable from others who pay taxes only on their incomes. Hence, by taxing the former to the extent their income taxation exceeded their property taxation, the Legislature intended to distribute with greater equality and justice the different burdens imposed on the whole body of taxpayers and designed also to encourage and foster the payment of taxes on tangible and specific property by assigning such taxpayers to a distinct class in the imposition of income taxes, that being a subject of taxation within the control of the Legislature, except that, in any event, a tax on

income must bear equally upon every person belonging to the same class. This equality of burden, among the members of any of the different classes recognized in the act, applies to those forming the class designated in Section 32 of the Act under review. And that section is, therefore, not obnoxious to Section 3, Article 10 of the Constitution.

Neither had the Legislature surrendered the power to tax the property of corporations by the act under review. The thing taxed in this act is not, as has been shown, the "property" of a corporation in the adjudicated meaning of that word when employed in the Constitution.

Nor is there any logical basis for the further contention of appellant that the Income Tax Law contravenes the Fourteenth Amendment of the Constitution of the United States. In speaking of the relationship of the Nation to the States, as to the exercise of the taxing power by the latter, the Supreme Court of the United States said:

"There is no general supervision on the part of the Nation over State taxation; and in respect to the latter, the State has, speaking generally, the freedom of a sovereign both as to objects and methods." [Michigan Central Railroad Co. v. Powers, 201 U. S. 245; Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232; Davidson v. New Orleans, 96 U. S. 97; State ex rel. Bolens v. Frear, 148 Wis. 456; Alderman v. Wells, 85 S. C. 507.]

VI. The conclusion reached in this case is fraught with the greatest significance and import to the people of the State whose representatives, in the enactment in question, achieved a marked advance in the improvement of the fiscal policy, upon the proper adaptation of which depends the entire wellbeing and support of the commonwealth, the growth and development of its industrial system and the sustenance and stability of the State government, as well as the proper and wholesome functioning of its varied organs and departments. We have approached

Wise
Statute.

the question with a full sense of its momentous import and our duty to resolve, if reasonably possible, every doubt in favor of the validity of the law designed for the betterment of the people and to provide sustenance for the conduct of the government. That we have been able to reach this result compatibly with the restraints of the Constitution is a matter of profound satisfaction. Our organic law was framed in the nineteenth century, and was necessarily narrowed in its perspective by the environing conditions of contemporary life. The framers of that instrument were not prophets and were unable, therefore, to forecast future conditions which must arise "in the shifting attitude of human affairs" in the growth of the world, or from new demands of social justice under the complex conditions of a more refined and developed civilization.

The measure which we have been considering is an embodiment in concrete form of the postulate of social science that the revenues of a State should flow equally from all its varied sources of wealth, forming an ample reservoir of power for governmental action and affording the means essential to accomplish the great ends for which the commonwealth was established, relating to the care and education of its youth, the necessities of internal improvement, the support of its charities, the conservation of the morals and property of its people and the due enforcement of its laws. In the act under review the Legislature performed, with rare intelligence and fidelity to the trust imposed on them by the people, an act of prescient statesmanship, without contravening any of the limitations imposed on their action by the Constitution of the State. We therefore hold the act to be valid.

The judgment of the trial court is, therefore affirmed.

It is so ordered. *Walker, Blair and Graves, JJ.*, concur; *Blair, J.*, in paragraphs 1, 2, 3, 4, 5 and result; *Faris, J.*, dissents, in separate opinion, in which *Woodson, J.*, joins; *Williams, J.*, dissents, and concurs in portions of the dissenting opinion of *Faris, J.*

FARIS, J. (dissenting.)—I cannot in the face of the Constitution agree to either what is said in the majority opinion or to the result reached therein. The facts are set forth meagerly. I purpose first to say what the case is about and then to express my views about it.

This is a suit by injunction begun by plaintiff, a Missouri corporation, suing for itself and all others similarly situated, to restrain and enjoin the defendant, as Assessor of the City of St. Louis, from assessing plaintiff for income taxes, and from compelling plaintiff to make a return, under the provisions of an act entitled: "An Act Providing for the Assessment, Levying, Collecting and Paying of Income Tax," approved April 12, 1917. To the petition of plaintiff the defendant interposed and the court *nisi* sustained a general demurrer. Plaintiff refused to plead further, final judgment was entered, and plaintiff appealed.

The case involves but the single question of the constitutionality *vel non* of the act above mentioned, which for brevity I shall hereinafter refer to as the "Income Tax Act." The grounds whereon plaintiff bottoms its attack upon the constitutional validity of this act are thus set forth by it in the petition held bad below, viz.:

"That said act of the Legislature of the State of Missouri is unconstitutional, null and void, in that it violates the Constitution of the State of Missouri and particularly the following provisions thereof, to-wit:

"(a) Section 3 of Article 10 whereby it is provided that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

"(b) Section 4 of Article 10, whereby it is provided that all property subject to taxation shall be taxed in proportion to its value.

"(c) Section 6 and Section 7 of Article 10 whereby all laws exempting property from taxation, except as therein enumerated, shall be void.

"(d) Section 8 of Article 10, wherein limitation is placed upon state tax on property.

“(e) Section 2 of Article 10, whereby the power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly.

“(f) Section 53 of Article 4, wherein the General Assembly is prohibited from passing any special laws exempting property from taxation.

“That said act is unconstitutional and void in that it violates the Constitution of the United States, and particularly the following provisions thereof, to-wit:

“(a) Section 8 of Article 1, which vests in Congress the power to regulate commerce with foreign nations and among the several States.

“(b) Article 14 of the Amendments thereto, which provides that no State shall deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The provisions of the Income Tax Act, so far as they will become pertinent in making clear the points I find it necessary to discuss, are, in brief substance, these:

Section 1 provides for the levying of a tax of one-half of one per cent for the last half of the year 1917, and for the whole of all subsequent years, upon the net income of all citizens of the State, and a like tax upon the incomes of non-residents, derived from property within the State.

Section 2 defines net income, but since I shall have occasion to quote this definition in full in the course of the opinion, I do not need here to take up space with it. This section also provides for the levying of this tax upon the estates of deceased persons in course of administration. There is likewise a provision in Section 2 for ascertaining the increment of value of all property bought before the act takes effect, as a basis of fixing the “gain” thereof, that is to say, the “income” therefrom.

Section 3 specifically defines the sources of certain taxable incomes, with a view to guard against fraudulent practices and evasive subterfuges. Section 4 exempts

insurance paid to beneficiaries, returns of premiums paid to the assured, principal of gifts, and devises, interest accruing from the obligations of the United States, of the State or of any political subdivision thereof, and the compensation paid to public officers for public services, "where the taxation thereof would be repugnant to the Constitution."

Section 5 provides for deductions, allowed to be made in figuring net income for taxation, and in the main follows the Federal Income Tax Act in this behalf. Deductions are allowed from gross income for the necessary expenses of carrying on any business in which the taxpayer is engaged and from which the income is derived, except "personal, living or family expenses;" for all interest paid on debts, within the taxing period; for all taxes paid, except benefit assessments; for all losses sustained in business, or by fire, flood, theft, storm or sea, unless such losses are compensated by insurance; for losses accruing from wear and tear, and for exhaustion and diminution of capital in mines, gas wells and oil wells by working or flow.

Section 6 provides that no income of a single person less in amount than \$3000, and no income of a married person less in amount than \$4000, shall be taxed, but all incomes less in amount than the sums named shall be wholly exempt and non-taxable. While the above exemptions apply inferentially only to citizens, a non-resident may by filing a return showing total income from all sources everywhere be allowed the benefit of the exemptions named, according to his total income and domestic status.

Section 7 provides for the levying of a tax of one-half of one per cent upon the annual net incomes of all business corporations and associations (except partnerships). Section 9 provides for the deductions which are permitted to be made from gross income of such business corporations and associations, in order to ascertain the taxable net income. These are as to expenses of operation, losses by catastrophe, wear and tear and exhaustion, in all substantial respects similar to

those provided by Section 5, *supra*, for natural persons.

Section 8 exempts wholly all incomes of all labor, agricultural and horticultural organizations; mutual savings banks, the stock of which is not represented by shares; fraternal benefit societies, orders and associations operating under a lodge system and providing life, sick, accident or other benefits to the members thereof, or to the dependents of such members; domestic building and loan associations, and co-operative banks which have no capital stock, and which are run for mutual purposes without profit; cemetery companies owned and operated exclusively for the benefit of their members; corporations and associations operated exclusively for religious, charitable, scientific or educational purposes, wherein no part of the income inures to any stockholder or individual; business leagues, chambers of commerce, and boards of trade, wherein the income does not inure to any stockholder; civic leagues operated exclusively for the promotion of public welfare; clubs organized for recreation or pleasure; mutual insurance companies, ditch and irrigation companies; co-operative telephone companies, wherein dues, fees and assessments are paid to cover necessary expenses only; farmers, fruit growers, and all similar associations, organized to act as sales-agents to market the products of the members thereof; corporations organized to hold property and collect income thereof, wherein such income is paid over to any organization which is itself exempt from this tax; land banks and farm loan associations, and joint stock land banks, so far as the income thereof shall be derived from bonds, or debentures, or another joint-stock bank or any Federal land bank, and all incomes derived from any public utility performing functions of national government, or performing functions incident to the government of the State, or of any political subdivision thereof, and incomes from any contract made with the State or any political subdivision thereof, touching a public utility, and wherein the levying of the tax would have the effect to impose

a burden upon the State, or upon any political subdivision thereof.

Section 32 provides that all *taxes paid to the State* by any person or corporation upon real or personal property for any current year, may be deducted from the amount of income tax, which would otherwise be payable by such person or corporation.

Other sections, which are not digested or epitomized supra, either have reference solely to the details of assessment and collection of this tax, or have no material relevancy to the points we find ourselves compelled to consider. Other details may have been omitted, when such seemed to have no bearing upon the points pressed upon our attention, but a reference to the act itself will readily supply to the curious this omission.

I. Some effort, I may mention in passing, is devoted by plaintiff to showing that while the Income Tax Act of this State is a substantial rescript of the

Federal
Act. Federal Income Tax Law, the fact that the latter has been held constitutional in no wise

aids us in determining the validity of the State act. This is frankly conceded by defendant; and in fact, it is so self-evident that even lacking the concession mentioned, comment beyond mere statement of the point made would be idle. The fundamental differences between the Federal Constitution and our State Constitution in most respects make comparisons upon constitutional questions futile and practically valueless. The former is a grant of power, while the latter is a limitation upon power. The State Legislature may legislate upon any subject affecting the welfare of the people, which is not forbidden by the organic law.

One peculiarity of our Constitution dealing with the power to levy taxes is, however, historically interesting. The power to levy taxes is in the Constitution of 1875,

specifically conferred by the people upon the
Legislative
Power. Legislature, as is also the power to delegate this authority (the latter perhaps of necessity) by law to counties and other municipal cor-

porations. [Sec. 1, Art. 10, Const. 1875.] But this general power to tax so confided to the Legislature was by the Constitution most carefully limited by subsequent sections. [Cf. Secs. 2, 3, 4, 5, 6, 7, 8, and 9, Art. 10, Cons.] The Constitution of this State is, therefore, it will be noted, upon the matter of taxation, *both a grant of power and a careful limitation* of the power granted. This was not the case in the Constitution of 1865. In the latter, the power to tax was deemed inherent in the Legislature, because there was no provision therein conferring such power. But the question is merely of academic interest. For the inherent power in the Legislature to levy taxes for public purposes would undoubtedly exist even if the provision in Section 1 of Article 10 of the Constitution, conferring the power, were non-existent. This is elemental, but in addition, was so ruled by this court as to the Constitution of 1865, wherein there was no such provision. [Glasgow v. Rowse, 43 Mo. 479.] It is to be inferred, therefore, that the makers of our Constitution saw fit to express in words an inherent power, in juxtaposition to careful limitations of that power, in order to emphasize and accentuate those limitations.

Reference to the pleadings discloses that the Income Tax Act is alleged by plaintiff to offend against the Constitution of this State in six different ways, and to run counter to the Federal Constitution in two respects. Expressing doubt without deciding whether the versatility of any Legislature is equal to the task of passing an act which could in so wholesale a way offend all of the applicatory provisions of the Constitutions, I pass to a consideration of these contentions in their order.

II. Plaintiff's first contention is that the Income Tax Act violates that provision of the Constitution which requires that taxes "shall be uniform upon the same **Uniformity.** class of subjects within the territorial limits of the authority levying the tax." [Sec. 3, Art. 10, Const. 1875.] This requirement of uniformity applies to and limits both the Legislature and any

county or other municipality to which the Legislature may by law delegate the authority to levy taxes. To make clearer the nature of this contention and its applicability, or the lack thereof, to the Income Tax Act, some self-evident propositions may be mentioned; (a) The Income Tax Act is a revenue measure purely; (b) it is not an occupation tax, because, while it taxes incomes derived from labor, trades, business and professions, it also taxes incomes from rents on land and interest from bonds, money loaned and all other incomes from either real or personal property; (c) it is not a license tax, imposed for regulatory purposes, because there is no element of regulation, or any exercise of the police power involved in any wise or to any degree; (d) it is a direct tax, in contradistinction to an indirect tax, i. e., it is a tax demanded and collectible from the identical persons against whom it is levied, and not one (as is an indirect tax) which is added to the cost or price of the thing taxed, and which is to be borne by the purchaser or consumer of such taxed commodity.

If income is property (and even the majority opinion agrees that it is), then clearly it is a direct property tax, or a direct tax upon property. Income is *ordinarily* paid in money. Money is taxable property. Income is *always* paid either in money, or in kind, that is, in real and personal property from which it accrues or by which it is earned. Of course real and personal property are taxable; so, income is always paid in a commodity, which is taxable by the State. Income, particularly net income which I am here considering, is the original and sole source of all existing private property. The very definition of the word forecloses doubt upon the truth of this fact. For lexicographers define it as "that gain which proceeds from labor, business, property or capital of any kind." [Webster's Dict.] It is defined by the law-writers in terms similar in all substantial respects. [22 Cyc. 63.] The law-writers follow the case-law in their definitions. [Stratton's Independence v. Howbert, 231 U. S. l. c. 415; Opinion of the Justices, 220 Mass. l. c. 624; Opinion of

the Justices, 195 Mass. 607; Opinion of the Justices, 77 N. H. 600.] In *Stratton's Independence Mine Limited v. Howbert*, supra, at page 415, it is defined "as the gain derived from capital, from labor, or from both combined." Even the Income Tax Act itself defines an income substantially as above, and in such wise as to make manifest that it is property, thus:

"The net income of a taxable person shall include gains, profits, and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, business, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or the use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

It is true that such portion of any given income as is consumed in living expenses cannot be added to capital. But it is too plain for argument that even such part of an income is property, and so remains till consumed for immediate needs. If it is paid in money, which being the medium of exchange is the universal representative of property, we already tax it under the general or existing law as property, if on hand on the first day of June; likewise if it be paid in kind, that is, in the same sort of commodity from which it is derived, it is taxable as property under the existing law, if on hand June the first. Besides, the tax here levied upon incomes is not levied solely upon incomes consumed in living expenses as it accrues, but it is levied alike upon that income which is immediately consumed, and upon that (a part of which it takes) which is added to capital and which becomes permanent tangible property, otherwise taxed *ad valorem*.

In a way of speaking and by a figure of speech it may sound plausible to say that in the production of income "labor is the tree and income the fruit," or that "capital is the tree and income the fruit" (Waring

v. Savannah, 60 Ga. l. c. 100), but even this plausibility applies only to the process of production, and when production is completed the fruit instantly becomes property. Even more plausible does this figure of speech appear when applied to income which is consumed, except as to the part taken away as taxes, by immediate needs. But while plausible, it is obviously erroneous, for even if a laborer, or a professional man, collect pay, i. e., income, for his services in money, he exchanges that money for food and clothing, and that food and clothing are property. The fact that such property is presently consumed does not alter its status as property. The owner of real estate may rent it either for money, the representative of all property, or for a part of the crop grown upon the land. In both cases, what he gets as rent is income from the land and is income under the act I am now discussing, and that income is property, whether it is paid in money, or in bushels of wheat or corn, or in bales of cotton. And the State under this act proposes to take one-half bushel from every hundred bushels of that wheat-rent and two and one-half pounds from every bale of that cotton-rent, regardless of whether the remainder of the wheat or the cotton are made into bread and clothing for the family or not.

There was a time when some of the courts held that a tax upon incomes was not a tax upon property (*Waring v. Savannah*, *supra*; *Glasgow v. Rowse*, 43 Mo. l. c. 491), thus in substance and effect holding that "the gain from labor and capital" is not property. The fundamental error in such a view grew out of the heresy that "gain from labor or capital," i. e., income, is for a shadowy season a sort of intangible entity which the State may take and tax in a transition or chrysalis stage, after its production but pending its fixed investment in some other sort of property, or pending its becoming property, or transformation into property. We are nowhere told in these cases when the change

from an intangible entity, to tangible, taxable property takes place.

However, the origin of the heresy is not important now, for scarcely any respectable court is adhering to the view *that income derived from real and personal property, at least, is not itself property* and that a tax upon such income is not a charge against and a tax upon such property itself. [Pollock v. Farmers' Loan & Trust Co., 157 U. S. l. c. 596; Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601; Opinion of the Justices, 220 Mass. 613; Brushaber v. Union Pacific Railroad, 240 U. S. l. c. 15; Welton v. Missouri, 91 U. S. l. c. 279; State v. Bengsch, 170 Mo. 81; Knowlton v. Moore, 178 U. S. l. c. 82; Flint v. Stone Tracy Co., 220 U. S. l. c. 149; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397; State ex rel. Bolens v. Frear, 1915B. L. R. A. l. c. 592; Brown v. Maryland, 12 Wheat. l. c. 444; Weston v. Charleston, 2 Peters, 449; Almy v. California, 24 Howard, 169; Railroad Co. v. Jackson, 7 Wall. 262; Cook v. Pennsylvania, 97 U. S. 566; Leloup v. Mobile, 127 U. S. 640; Lott v. Hubbard, 44 Ala. l. c. 603; Philadelphia, etc., Co. v. Pennsylvania, 122 U. S. 326.]

This whole question was reviewed at great length by the Supreme Court of the United States in the case of Pollock v. Farmers' Loan & Trust Co., 157 U. S. l. c. 580 *et seq.*, where it was said.:

"The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real

estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice ~~PETERSON~~ observed in *Hylton's* case, 'land, independently of its produce, is of no value;' and certainly had no thought that direct taxes were confined to unproductive land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice MARSHALL said: 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice THOMPSON and Mr. Justice JOHNSON, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds,

and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice MARSHALL delivering the opinion, overruled that contention.

"So in *Dobbins v. Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy v. California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co. v. Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook v. Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, and *Leloup v. Mobile*, 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance and not the shadow, determines the validity of the exercise of the power.' [*Postal Telegraph Co. v. Adams*, 155 U. S. 688, 698.]"

While the Supreme Court was divided upon a number of propositions up for judgment in the *Pollock* case, *supra*, it was not divided upon the question whether a tax upon income accruing out of real or personal property is not a tax upon such property itself. [*Pol-*

lock v. Farmers' Loan & Trust Co., 158 U. S. 601; Knowlton v. Moore, 178 U. S. l. c. 81.] For in the second Pollock case, 158 U. S. 601, l. c. 618, it was said:

"Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and this court went no further, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

"We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution."

In the Opinions of the Justices, 220 Mass. l. c. 623, it was said:

"A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in realty a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not mat-

ter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 561; s. c., 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by Opinion of the Justices, touching the so-called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusion there reached. To the same effect see Opinion of the Justices, 77 N. H. 611."

So much may be said upon the specific question whether a tax upon an income derived from real or personal property, is also a tax upon the property itself from which the income accrues. Whether a tax upon an income derived from labor or from the practice of a profession, is a tax upon that labor and that profession, and therefore a tax upon property, I need not stop to consider. I think it is, and I think the cases so hold. [*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., l. c. 580, and cases cited, *supra*.] Indeed, the learned majority opinion concedes both propositions, as matters so simple and apodeictic as to render argument thereof offensive to the intelligent. Thus, to-wit, on these points says the majority opinion: "*That income is property, because it is an ownable thing is a matter of simple apprehension which has been affirmed under the definition of property above stated. That it is 'in effect' a taxation of the labor or capital which produced it, may be conceded, since by reaction it affects the value of the thing or things from which it is derived.*" (Italics are mine). Obviously, with this thoroughgoing concession even of a self-evident truth, I could put an end to these remarks and reverse this case, but it is near enough to my present purpose to grant for the sake of the argument only that a tax

upon income derived from labor or from the practice of a profession is not a tax upon the identical labor or profession from which it accrues. But obviously the fact and the concession merely serve to accentuate the glaring lack of uniformity in the imposition and payment of the taxes proposed to be levied by the Income Tax Act.

Manifestly, the subject of taxation and the thing taxed, or by this act proposed so to be, is an income, that is to say, the whole of the net income of a business corporation, the net income in excess of \$3000

Exemptions. of all single persons, and the net income in excess of \$4000 of all married persons. Does the act tax incomes uniformly as the Constitution requires? I think not. The lack of uniformity is I think patent: (1) Incomes of single persons less in amount than \$3000, are not taxed at all. [Sec. 6, p. 527, Laws 1917.] (2) Incomes of married persons, less in amount than \$4000, are not taxed at all. [Sec. 6, p. 527, Laws 1917.] (3) Incomes from real property and from personal property are in effect taxed at the rate of 35 cents on each \$100 thereof. [Sec. 32, p. 538, Laws 1917.] (4) Incomes from labor and professions are taxed fifty cents on the \$100 thereof. [Sec. 32, p. 538, Laws 1917.] (This condition is brought about by deducting from the tax payable on incomes, the current *ad valorem* tax paid to the State on either real or personal property, and it is a legislative confession that the income tax is a tax upon property). (5) Incomes of business corporations are taxed on the total amounts thereof without any exemption whatever. [Sec. 7, p. 528, Laws 1917.] (6) Incomes from numerous alleged educational, fraternal, charitable, benevolent, agricultural and religious corporations and associations are wholly exempted from the tax. [Sec. 8, p. 529, Laws 1917.] This exemption list, which is itself violative of another section of the Constitution (Secs. 6 and 7, Cons. 1875), (if income is property, and if an income tax is a tax on property), would not of course violate the uniformity provision of our Constitution, if there were in the Constitution any

authority to exempt the divers businesses, associations and corporations set down in this lengthy list, but there is no such authority. The Constitution expressly declares void all laws creating exemptions other than those of the kinds and classes specified in Section 6 of Article 10 thereof. [Sec. 7, Art. 10, Const. 1875.] Likewise I apprehend exemptions would be warranted either in cases of corporations or persons, when the income is already taxed either at the source or in the hands of the recipient. But the latter point would not materially affect the condition presented.

Whether this tax is a property tax or a license tax, or an occupation tax; whether it is a direct tax or an indirect tax, the Constitution of this State requires it to be uniform in its burdens upon the same class of subjects, that is to say, upon incomes. [State v. Bengsch, 170 Mo. 81; City of Independence v. Gates, 110 Mo. l. c. 382; State ex rel. v. Switzler, 143 Mo. 287; Elting v. Hickman, 172 Mo. 237; Kansas City v. Whipple, 136 Mo. 475.] The word "uniform" is used in the Constitution in its usual and ordinary meaning, which is, "conforming to one rule; having the same form, manner or degree; not varying or variable." [Webster's Dict.] Clearly, it will not permit the levying of a "graduated" tax, on property, therefore it will not permit of forbidden exemptions, which are in a sense but violent forms of a graduated tax. Uniformity of taxation "upon the same class of subjects within the territorial limits of the authority levying the tax," means, and therefore it requires, (a) that the tax levied shall be the same in one county of the State as it is in any other, and (b) that all property and each dollar's valuation of the given subject or thing proposed by the law to be taxed shall be burdened by the tax in an equal degree. It forbids, I think, that part of the property, or some one or more of the component elements of the subject proposed to be taxed, shall be selected to bear the whole burden of the tax while other constituents of the subject taxed are left wholly unburdened thereby.

In the case of *City of Independence v. Gates*, supra, at page 382, this court said:

"Taxation, whether general or special, must be uniform and must be distributed among those who are to pay it by a just ratio of apportionment. It cannot be levied by an arbitrary command of the lawmaking power. One rule cannot be applied to one owner and a different rule to another owner."

Likewise, quoting from Judge COOLEY, it was said in the case of *Kansas City v. Whipple*, 136 Mo. l. c. 479:

"'Inequality does not necessarily follow the restricting of a tax to a few subjects only, or even to a single subject. . . . But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made, . . . for if the principle of selection be once admitted limits cannot be set to it, and it may be made use of for the purpose of oppression, or even of punishment.'"

The provision of our Constitution requiring uniformity of levy upon the same class of subjects, was not contained in the Constitution of 1865 (*State ex rel. v. Lewis*, 256 Mo. 121), but it came from the Pennsylvania Constitution of 1874. It is clear, therefore, that no question such as now confronts us was before this court in the case of *Glasgow v. Rowse*, 43 Mo. 479, which was decided in 1869. It follows, that while the reasoning in that case is in some respects archaic, no necessity arises for overruling it, so far as concerns the specific point of uniformity *vel non* in the levying of the tax. While an authority (*upon the sole theory that income is not property*) against my view that the act fails to tax property in proportion to its value, it is an authority in favor of the view that the act is not uniform in its operation. This for the reason that it classifies an income tax as one "having a mixed effect upon persons and property." If the Income

Tax Act operates in one way upon persons and in another way upon property it is not uniform.

The makers of our Constitution, as hinted *supra*, took this provision *bodily* from the Constitution of Pennsylvania of 1874. [Sec. 1, Art. 10, Const. of Pa. of 1874.] Construing the clause of the Pennsylvania Constitution which required uniformity of levy upon the same class of subjects, in the case of Cope's Estate, 191 Pa. St., l. c. 22, wherein a collateral inheritance tax act was alleged to be invalid, for that it exempted from the operation of the law and from taxation all estates of the value of \$5000 or less, in connection with an exemption provision also like ours, the Supreme Court of that State said:

"The next clause of Section 1 expressly authorizes the Legislature to exempt from taxation four specified classes or kinds of property. This specific delegation of authority to exempt impliedly prohibits express exemption from taxation of any other property, but to place this matter beyond the reach of doubt, it is expressly ordained in Section 2 that 'all laws exempting property from taxation other than the property above enumerated shall be void.'

"These limitations on the power of the Legislature mean something. They are plainly intended to secure, as far as possible, uniformity and relative equality of taxation, by prohibiting generally the exemption of a certain part of any recognized class of property, and subjecting the residue to a tax that should be borne uniformly by the entire class, and by guarding against any other device that necessarily or intentionally infringes on the established rules of uniformity and relative equality which, as we have seen, underlie every just system of taxation. In any view that can reasonably be taken of these limitations, it must be manifest to any reflecting mind that the act in question offends against them by undertaking to wholly exempt from taxation the personal property of a very large percentage of decedent's estates, and impose increased and unequal burdens on the residue of the same class of property.

"If the authority to exempt, etc., which was assumed and exercised by the Legislature in this case, is sanctioned by this court, the constitutional rule of uniformity virtually becomes a dead letter, and in lieu of the will of the people, as plainly declared in the fundamental law of the State, the unrestrained will of the Legislature becomes the supreme law on that subject. If the Legislature had authority under the Constitution to do what was done in this case, they had like authority to reverse their order of taxation, etc., and thus impose the tax on personal property amounting in value to \$5000 and less, and exempt therefrom all property of same recognized class in excess of that sum; and, consequently, they have like authority, in every case, to establish any other arbitrary ratio between the amount in value of property to be taxed and that which shall be exempt therefrom, in any class of subjects."

If there is error in the above holding of the Supreme Court of Pennsylvania, it arises fundamentally, from regarding an inheritance tax as a tax on property, and not from its interpretation of uniformity.

I conclude that however beneficent and greatly to be commended may be the scheme of putting the burden of taxation upon those citizens best able to sustain it by taxing incomes, such a plan cannot be carried out in this State unless the Constitution be amended, or unless all incomes be taxed, without exemptions, as to amount, and without exemptions as to source, other than those set down in the organic law. The Constitution of the State may be outgrown and stand badly in need of amendment, but this consideration addresses itself to the people and not to the courts. This court, I had supposed, sits here not to amend the Constitution, or to write a new one, but merely to interpret the one which the people have written. If that Constitution by reason of age and the progress of the times lags behind the progressive procession, such fact may furnish a good reason for adopting a new Constitution; it furnishes no reason for misinterpreting or doing violence to an old one. But few States of the Union have passed acts

Hiemens v. Harper.

taxing incomes. These, practically without exception, either had provisions in their constitutions expressly permitting such form of taxation, upon a graduated basis, or else they were compelled to adopt such provisions by amendments. [Campbell v. Shaw, 11 Hawaii, 112; State ex rel. v. Frear, 148 Wis. 456; Purnell v. Page, 133 N. C. 1. c. 126; Aldermen v. Wells, 67 S. E. (S. C.) 781.]

It follows also from what has been said above that the Income Tax Act of 1917 (Laws 1917, pp. 524-538, secs. 1-32) is also unconstitutional for that it is violative of Section 4 of Article 10 of the Constitution, whereby it is provided that "all property subject to taxation shall be taxed in proportion to its value." The act may also be constitutionally invalid (the fact that it levies a tax upon property being conceded) in respect of other contentions urged upon us by learned counsel for plaintiff, but since I am fully convinced of its invalidity in respect of the behalves discussed, no occasion exists to burden space with a consideration of other points so ably mooted.

Woodson, J., concurs in these views fully; *Williams, J.*, concurs in the result of this dissent, and concurs fully in that portion thereof which holds that the tax on incomes is a tax on property, and that the Income Tax Act violates Sections 6 and 7 of Article 10 of the Constitution.

FRANK X. HIEMENZ, Appellant v. JAMES P. HARPER et al.

In Banc, July 25, 1918.

1. **APPELLATE PRACTICE: Error Must Be Assigned.** Error must be assigned and shown before a reversal is warranted in a civil case.
2. ———: ———: **School Property: Special Tax Bill: Moral Obligation.** Plaintiff brought suit to enjoin a school board from ordering the the payment, out of school funds, of special tax bills, issued against

Hiemenz v. Harper.

school property, in payment for a sewer. The trial court held school property was exempt, but refused to grant an injunction "on the ground that the board were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Plaintiff on appeal confines his assignment of error to the question whether special tax bills can be legally enforced against school property, and fails to assail the ruling on which the court rested its judgment. *Held*, that all that appellant urges may be conceded and yet the judgment rests upon the independent and only ground on which the court placed it, and there being no assignment that the court erred in resting it upon that ground, the judgment must be affirmed.

Appeal from St. Louis Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

AFFIRMED.

Frank X. Hiemenz for appellant.

(1) Property of the Board of Education is not liable for the burden of special taxation for local public improvements, nor can it be sold on execution, general or special. *State ex rel. v. Tiedemann*, 69 Mo. 306; *City of Clinton ex rel. v. Henry County*, 115 Mo. 557; *St. Louis v. Brown*, 155 Mo. 545; *Mullans v. Cemetery Association*, 239 Mo. 689; *Thogmart v. Nevada School District*, 189 Mo. App. 10; *Inhabitants of Worcester County v. Mayor*, 116 Mass. 193; *Trustees of Public School v. City of Trenton*, 30 N. J. Eq. 681; *Board of Improvement v. School District*, 56 Ark. 354; *City of Hartford v. West Middle District*, 45 Conn. 462; *City of Toledo v. Board of Education*, 48 Ohio St. 85; *Whittler v. Mission School District*, 121 Cal. 350; *Sutton v. City of Montpelier*, 28 Ind. 315; *City of Louisville v. Leathermann*, 99 Ky. 213; *Mayor v. Hamblen County*, 188 S. W. (Tenn.) 796; *Endlich on Interpretation of Statutes*, (Ed. 1888), sec. 163, p. 225; *Dillon on Municipal Corporations* (5 Ed.), 2432. (2) The only remedy given for the collection for an assessment of special taxes is by means of the lien created upon the property and which can only be enforced by a sale of the property. The only action

Hlemez v. Harper.

maintainable is one on the special tax bill, to subject the property to the payment of the lien, and the amount of the bill can only be collected out of the property charged with the lien. It has no validity save as a lien on the land charged, and if there is no lien created or the lien is destroyed, no charge remains. *St. Louis to use v. Allen*, 53 Mo. 44; *Carlin v. Cavender*, 56 Mo. 286; *St. Louis to use v. Bressler*, 56 Mo. 350; *Seibert v. Capp*, 62 Mo. 182; *Louisiana v. Mueller*, 66 Mo. 467; *Higgins v. Ausmuss*, 77 Mo. 351.

Chas. W. Bates and Daird Goldsmith, Amici Curiae.

(1) The present suit cannot be maintained, and this regardless of the merits of the claims on which it is based. *Albright v. Fisher*, 164 Mo. 56; *Bradley v. Gilbert*, 155 Ill. 154; *People ex rel. v. Clark*, 70 N. Y. 518; *Berdan v. Sewerage Commissioners*, 82 N. J. Eq. 236; *Jackson v. Hoover*, 76 N. J. Eq. 592; *Bennings Case*, 2 Bland's Rep. (Md.) 99; *Stevens v. St. Mary's Training School*, 144 Ill. 336; *Linder v. Case*, 46 Cal. 171; *Merriam v. Board of Supervisors*, 72 Cal. 517. (2) The property of the Board of Education, whether used for public schools exclusively or not so used, was liable to assessment to pay the cost of the construction of the sewer, said property being within the taxing district. *Charter, City of St. Louis; Construction Co. v. Railroad*, 206 Mo. 172; *City of Chicago to use v. City of Chicago*, 207 Ill. 45; *In re Howard Ave.*, 44 Wash. 62; *City of Kalispell v. School District*, 122 Pac. 472; *State ex inf. v. Vallins*, 140 Mo. 523, 535; *State v. Bengsch*, 170 Mo. 114; *Franklin Co. v. City of Ottawa*, 49 Kans. 756. The Board of Education has the power to, and it is its duty to, pay the assessments in question, even though they are not legally enforceable. *Hill v. St. Louis*, 159 Mo. 159; *Bailey v. Philadelphia*, 167 Pa. St. 573; *City of St. Louis v. Von Phul*, 133 Mo. 566; *Board of President and Directors of St. Louis Public Schools v. Wood*, 77 Mo. 201; *Barber Asphalt Pav. Co. v. St. Joseph*, 183 Mo. 459;

Hiemenz v. Harper.

Secs. 1391 and 1392, Revised Code of St. Louis; State ex rel. Crow v. St. Louis, 174 Mo. 125.

BLAIR, J.—Appellant and respondents (except Mason) constitute the Board of Education of the city of St. Louis. Mason is secretary and treasurer of the board. This suit was instituted to enjoin respondents from ordering the payment of special tax bills out of school funds. The tax bills were issued against school property in part payment of the construction of a sewer. This appeal is from a judgment dismissing appellant's bill. Several questions are discussed.

The trial court held school property was exempt, but, as appellant states, "refused to grant an injunction, on the ground that the majority of the Board of Education were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Appellant confines his assignments of error and his argument to the question whether special tax bills legally can be enforced against school property. He neither discusses nor attacks the court's view that the Board of Education is authorized to pay on the theory that a moral obligation rests upon it. In other words, he confines his brief to a *support* of the court's finding that there was no legal obligation, and fails to assail the finding on which the court rested its judgment against him. All that appellant urges can be conceded and yet the judgment rests upon an independent ground—the only ground on which the court placed it. The court may have been right or wrong. No assignment or argument advanced by appellant asserts he was wrong. Error must be assigned and shown before a reversal is warranted in a civil case. This has not been done. Affirmed. All of the judges concur except *Woodson, J.*, who dissents.

INTER-RIVER DRAINAGE DISTRICT, Appellant v.
ELIJAH HAM et al.

Division Two, July 16, 1918.

1. **SURFACE WATER: Protection: Damages: Condemnation.** Overflow water from a stream is surface water, and the owner of land has the right by constructing embankments to shut off such surface water from his land without being liable in damages to the owner of another tract for the injury thus done. But that rule does not relieve a drainage district from responding in damages done to land between its levee and such stream by increasing the overflow of water on such land, for the drainage district does not own land or a right of way, but in seeking to condemn a right of way for its levee through the land of such owner must comply with the constitutional mandate declaring that "private property shall not be taken or damaged for public use without just compensation."
2. ———: ———: ———: ———: **Levee Through Owner's Land: Increased Overflow.** The exceptors owned 118.95 acres of land bounded by a river. The drainage district took 8.1 acres of the tract for the right of way of its levee, and the levee was so constructed as to leave 30.95 acres of the tract outside of the levee and between it and the river. *Held*, that, as the drainage district did not leave all of exceptors' land between the levee and the river, but appropriated a part of it for the levee right of way, it was liable in damages for the increased overflow of the river waters on the 30.95 acres, under that provision of the Constitution that says that "private property shall not be taken or damaged for public use without just compensation," and cannot escape the payment of such damages on the theory that the owner of lands has the right to shut off surface water from his lands without being liable in damages to another owner for the injury thus caused, for the drainage district is not the owner of any land, but is seeking to condemn a right of way for the levee through, and not outside of, exceptors' lands. [Distinguishing *Jackson v. United States*, 230 U. S. 1, and *Hughes v. United States*, 230 U. S. 24.]

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*,
Judge.

AFFIRMED.

L. R. Thomason and Oliver & Oliver for appellant.

(1) The injury, if any, caused by the raising of the water between a levee to be constructed by the drainage district and the bank of a river which overflows its banks to such an extent as to render necessary the construction of the levee in order to protect the lands within the district is *damnum absque injuria*. *Cubbins v. Commissioners*, 241 U. S. 351; *Jackson v. United States*, 230 U. S. 1; *Hughes v. United States*, 230 U. S. 24; *Rex v. Commissioners*, 23 Eng. Ruling Cases, 792, 8 Barn. 355; *Eldridge v. Trezevant*, 160 U. S. 452; *McCoy v. Board of Directors*, 95 Ark. 345; *St. L. S. W. Ry. v. Board of Directors*, 207 Fed. 338, 197 Fed. 815; *Richardson v. Levee Com.*, 62 Miss. 807; *Lamb v. Reclamation Dist.*, 73 Cal. 125; *Tinicum Fishing Co. v. Coster*, 36 Am. Rep. 632; *Farnham on Waters*, p. 1338. (2) The occasional raising of the water by the construction of the levee does not constitute a taking within the meaning of the Constitution. It is but the incidental consequence of the lawful and proper exercise of a governmental power. *Transportation Co. v. Chicago*, 99 U. S. 635; *Scranton v. Wheeler*, 179 U. S. 141; *Migault v. Springs*, 199 U. S. 473; *Gibson v. United States*, 166 U. S. 269. (3) It is the settled rule in this State that waters overflowing the banks of a stream are surface waters. *McCormick v. Railroad*, 57 Mo. 433; *Abbott v. Railroad*, 83 Mo. 280; *Schneider v. Railroad*, 29 Mo. App. 71; *Jones v. Railroad*, 18 Mo. App. 251; *Benson v. Railroad*, 78 Mo. 512; *Edwards v. Railroad*, 97 Mo. App. 109. (4) At common law surface water is a common enemy. The common-law rule obtains in Missouri, and any individual or group of individuals may construct levees to protect their property from such waters. The drainage district being created for the purpose of protecting property has the same right. *Thompson v. Railroad*, 137 Mo. App. 69; *Thaele v. Planing Mill Co.*, 165 Mo. App. 717; *McCormick v. Railroad*, 57 Mo. 437; *Benson v. Railroad*, 78 Mo. 504;

Walther v. City of Cape Girardeau, 166 Mo. App. 476; Grant v. Railroad, 149 Mo. App. 310; Mehonray v. Foster, 132 Mo. App. 231; Abbott v. Railroad, 83 Mo. 285. (5) All the lands in the Louisiana Purchase adjacent to streams when acquired by the United States were charged with a covenant authorizing the sovereign to use such portion of the land along the river banks as was necessary for the construction of roads, tow-paths, levees and other public improvements. That covenant still runs with the land and this appellant, an arm of the State, has the legal right to appropriate that right to its own benefit. Spanish Regulations for the Allotment of Lands; Laws Mo. (Digest) 1818, p. 438 et seq., p. 442, Arts. 3, 8, 14 and 26; Treaty between French Republic and Spain concluded Oct. 1, 1800, ceding Louisiana Territory to France, U. S. Senate Doc. 357, p. 506; Treaty between French Republic and United States, concluded April 30, 1803, ceding Louisiana Territory to United States, Laws Mo., 1818, p. 18; Code Napoleon, Articles 649 and 650; Sec. 16 of an Act of Congress entitled "An Act providing for the government of the Territory of Missouri," approved June 4, 1812; Laws of Mo. 1818, l. c. p. 66; Third proposition, Sec. 6, Act of Admission of Territory of Missouri as a state, R. S. Mo. p. 28; Cubbins v. Commissioners, 241 U. S. 351; Eldridge v. Trezevant, 160 U. S. 452. The further intention of the Congress of the United States is evidenced by the passage of the Act of September 28, 1850, granting to the State of Arkansas and other states the swamp and overflowed lands lying within their borders, "To enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein," etc. 9 U. S. Stat. 519. This appellant has been created to carry out the trust imposed by the Federal government on the several states having swamp lands, and should be permitted to avail itself of all rights incident to the cause for its creation.

Sheppard & Sheppard and *Leslie C. Green* for respondent.

The damages suffered by respondents on account of the erection of a levee by appellant through their land, causing the water from the St. Francois River to overflow the land between the levee and river bank to a greater depth, and at more frequent intervals, is not *damnum absque injuria*. Constitution of Missouri, art. 2, sec. 21; Laws 1913, p. 239, sec. 14; State ex rel. v. Taylor, 224 Mo. 481; Tarkio Drainage District v. Richardson, 237 Mo. 77.

ROY, C.—This is an appeal from the judgment of the circuit court of Butler County increasing the damages awarded by the commissioners appointed by that court to assess benefits and damages to the lands and property in the Inter-River Drainage District.

The exceptors (respondents), as cotenants, own 118.95 acres in a body bounded on the northeast by the St. Francis River, which river is the eastern boundary of the drainage district. The contemplated levee runs along the southwest side of the river so as to bisect the lands of exceptors. The right of way for that levee includes 8.1 acres of the tract, leaving 30.95 acres outside of the right of way and between it and the river, and including 79.90 acres of the tract within the protection of the levee.

Exceptions were filed by respondents to the report of the commissioners assessing benefits and damages. A jury increased the net damages from \$490 to \$605.

The district in that trial asked the following instruction, which was refused:

“The court further instructs you that even though you may find that the lands of exceptors are not now under present conditions flooded except when the St. Francis River reaches exceptionally high stages, and may further find that, after the completion of the works and improvements of the Inter-River Drainage District and the building of the St. Francis River Levee through

the lands of exceptor, his said lands lying between said levee and the bank of the St. Francis River will be overflowed by the flood waters of said river more frequently and to a greater depth and for longer periods of time than they are now overflowed, still such additional overflows on said part of exceptors' lands do not entitle him to recover damages from the drainage district therefor, and you will not take such facts and conditions into consideration in assessing the damages in this case."

The court instructed the jury that the district was liable for such damages. There was evidence tending to show such increase in the height of the water outside the levee. It is conceded that such question is the only one here involved.

Appellant contends that overflow water from a stream is surface water and that one proprietor of lands has the right to shut off such surface water from his land without being liable to another proprietor for the damage thus caused. That rule must be conceded. [McCormick v. Railroad, 57 Mo. 433; Benson v. Railroad, 78 Mo. 504; Abbott v. Railroad, 83 Mo. l. c. 280; Goll v. Railroad, 271 Mo. 655.]

But that rule does not help this appellant in the least. It is not the proprietor of one tract of land engaged in the act of shutting off the surface water from its tract, and thus keeping it back on the land of these respondents. This appellant does not own any land, nor any right of way for its levee. It is seeking to condemn such right of way over the land of respondents. In order to do that, it must comply with our State Constitution, Section 21 of Article 2, which says: "Private property shall not be taken or damaged for public use without just compensation." In State ex rel. v. Taylor, 224 Mo. 393 l. c. 482, it was said:

"In pursuance to that constitutional mandate, the Legislature duly enacted the drainage laws we now have under consideration. And whenever private property is about to be taken or damaged in consequence

Drainage District v. Ham.

of said improvements, then in steps said Section 21 and says all damages done private property by means thereof shall be first paid."

Appellant cites *Jackson v. United States*, 230 U. S. 1, and *Hughes v. United States*, 230 U. S. 24. In both those cases levees were constructed, but not on the lands of the complainants. Increased overflow of those lands was caused thereby. It was held that there could be no recovery. If the appellant were proceeding to build a levee leaving all of respondents' land between the levee and the river, those cases would be in point. As it is, they do not apply.

Appellant is bold enough to cite *Eldridge v. Trezevant*, 160 U. S. 452, where it was held that in the State of Louisiana, in pursuance of the laws of that State, the land of an individual could be taken without compensation for the construction of a levee on the bank of the Mississippi. In that case it was said:

"The concession distinctly made by the complainant, in his bill, that the state courts refuse to recognize that owners of lands abutting on the Mississippi River and the bayous running to and from the same, where levees are necessary to confine the waters and to protect the inhabitants against inundation, are entitled, when a public levee is located upon such lands, to invoke the application of that provision of the state constitution which provides that 'private property shall not be taken nor damaged for public use without just and adequate compensation first paid,' and repeated in the brief filed on his behalf in this court, relieves us from an extended examination of the origin and history of the state enactments, constitutional and legislative, and of the decisions of the state courts on this subject.

"It is important, however, to observe the ground upon which the state legislative and judicial authorities base their action. That ground is found in the doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions

thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation. This doctrine is said to have been derived from the Code Napoleon, whose 649th and 650th articles were as follows:

“ ‘Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility have for object the two paths along the navigable or floatable rivers, the construction or repairing of roads and other public or communal works. All that concerns this kind of servitude is determined by laws or particular regulations.’ ”

It is sufficient to say that we are proceeding under the law of Missouri, and not under that of the State of Louisiana. The difference in the laws of the two states is justified by the difference in the topography of their lands. We call attention to the fact that this appellant is not proceeding herein on the theory that it has a right to take without compensation therefor the lands of the respondents for the construction of a levee. If the law of Louisiana were in force in this State, as claimed by appellant, there would be no necessity for it to resort to this proceeding. It could take the right of way for the levee without payment therefor and without condemnation. The judgment is affirmed.

White, C., concurs.

PER CURIAM:—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE v. WILLIAM ALLEN et al.; CHRIS
SCHAWACKER, Appellant.

Division Two, July 16, 1918.

1. **SCIRE FACIAS: Forfeited Bond: Civil Action: Statutory Construction.** A *scire facias* proceeding on a forfeited bond, in so far as the nature of the proceeding itself is concerned, is a civil action, the bond or recognizance being nothing more than a formal confession of debt. Therefore a literal compliance with the statute requiring a bond to be taken for a bailable offense is not necessary, but the statute will be so construed as to effectuate the purpose for which it was enacted.
2. ———: **Bond to Appear at Same Term.** A bond given by an accused for his appearance from day to day during the June term of court then in session and from day to day during the next September term, which was not a term designated by the statute, but a part of the June term, notwithstanding the statute says a recognizance shall be taken for his appearance "on the first day of the next term," is enforceable against the surety upon default of the accused to appear at the September term; such statute, not being penal in so far as the *scire facias* proceeding is concerned, is not to be construed according to its strict letter, but in a manner to effectuate the purpose for which it was enacted, which was to secure the presence of the accused in court by authorizing him to substitute his voluntary contractual obligation for his physical custody.
3. ———: ———: **Statute of Jeofails.** The Statute of Jeofails (Sec. 5019, R. S. 1909), declaring that no proceeding upon a recognizance shall be defeated on account of any defect in form, or omission of recital or condition of undertaking therein, or other irregularity, is a part of the statute authorizing the giving of bonds or recognizances and requires said latter statute to be liberally construed in a manner to effect its purpose to secure the appearance of the accused for trial at the time specified.

Appeal from St. Louis Circuit Court.—*Hon. Leo S. Rassieur*, Judge.

AFFIRMED.

Willis H. Clark for appellant.

The provision of the bail bond requiring the appearance of the principal at the June term of the circuit

court was not authorized by law, and was surplusage, and the forfeiture of said bond at said June term was without authority of law, and the judgment founded upon such forfeiture is contrary to law. Laws 1865-6, p. 78; Laws 1869, p. 95, secs. 7 and 17; Laws 1909, p. 399; R. S. 1909, sec. 5039; R. S. 1909, sec. 4150; State v. Bobb, 39 Mo. App. 543; State v. Lewis, 61 Mo. App. 633; State v. Cobb, 44 Mo. App. 375; Howlett v. Turner, 93 Mo. App. 20; R. S. 1909, sec. 5134.

Frank W. McAllister, Attorney-General, and *C. P. Le Mire*, Assistant Attorney-General, for respondent.

(1) "These bail bonds are allowed in the interest of the defendants that they may be free until they are tried and either convicted or acquitted. It is not the purpose to permit defendants to enter into them to escape trial and punishment and then allow the surety to defeat their solemn obligations after the defendants have escaped." State v. Mudd, 232 Mo. 564; State v. Epstein, 186 Mo. 101; State v. Boehm, 184 Mo. 201; State v. Posten, 63 Mo. 521. (2) The *scire facias* sufficiently set forth the charge, entry of default, and all other facts necessary for the information of the surety, and the form has been approved by the decisions of this court. Demurrer to said writ was properly overruled. Secs. 5019, 5134, R. S. 1909; State v. Abel, 170 Mo. 59; State v. Epstein, 186 Mo. 93.

WALKER, P. J.—This is an appeal from a judgment rendered in the circuit court of the city of St. Louis in a *scire facias* proceeding on a forfeited bail bond.

William Allen was charged by information June 20, 1916, in the court of criminal correction of the city of St. Louis with carrying concealed weapons. He waived a preliminary examination and gave bond with Chris Schawacker, the appellant, as his surety, for his appearance before the circuit court of the city of St. Louis from day to day during the June term of the said circuit court, then in session, and also from day to day

State v. Allen.

during the next September term, 1916, then and there to answer any indictment that might be preferred against him, and not depart said court without leave. The next September term, which was not a term of court designated in the statute, but was a part of the June term, commenced on the first Monday in September, 1916. On the 18th of that month the said William Allen, upon being called to answer the charge preferred against him, made default, and his surety, upon being notified and demanded to bring him into court in conformity with the condition of said bond, failed to do so and a forfeiture was formally taken and entered thereon. A *scire facias* was thereupon sued out. Allen was not found, but his surety was served with a copy of the writ. He appeared and filed an answer, specifically denying each of the averments of the writ. Upon a hearing, the court rendered judgment against him in the sum of eight hundred dollars, the penalty in the bond.

Appellant seeks a reversal on the ground that the bond was on its face invalid, and hence the judgment rendered thereon was unauthorized.

The specific objection is that the bond required the principal, Allen, to appear and answer the charge at a term of the circuit court then in session and not to its next term.

The statute applicable to bonds of the character here under review provides that "if the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and not to depart such court without leave, and thereupon he shall be discharged." [Sec. 5039, R. S. 1909.]

The determination of the matter at issue is dependent upon the construction of the above statute. Is it to be construed according to its letter, or in a manner to effectuate the purpose for which it was enacted? If construed strictly, it must be held that it is penal in its nature and a literal

Civil
Proceeding.

compliance with its terms is necessary. That we have held in a number of cases that a *scire facias* proceeding on a forfeited bond was a part of the original case is beyond question, the last expression of the court in regard thereto being found in *State v. Wilson*, 265 Mo. 1. These cases, however, are limited to the determination of the jurisdiction of this court for the purpose of review. The holding, so far as the nature of the proceeding itself is concerned, is that it is a civil action, the bond or recognizance on which it is based being nothing more than a formal confession of a debt, the maturity and collection of which is dependent upon the arising of the condition therein named. [*State v. Mudd*, 232 Mo. 1. c. 573; *State v. Morgan*, 124 Mo. 1. c. 475.] These cases further hold that the action thus authorized is to be governed by the civil procedure, from which, it follows, that the statute upon which it is based is to be construed as of a civil nature, authorizing, as we have indicated, an action for the violation of a contractual obligation. This being true, there remains no reason, under the canons of construction, for a strict interpretation of the statute. The parties stand before the court on an equality in the assertion of their respective rights and, as applied to them, the law is to be construed so as to effectuate the purpose of its enactment.

The concrete facts necessarily existing in the execution of any bond or recognizance under this statute will, upon analysis, render more apparent the soundness of the conclusion that such statute should be liberally construed.

The Constitution declaring the right to bail and the statutes giving operative force to same are in the nature of instruments of grace in favor of the freedom of the individual. As such they should not be construed otherwise than in the spirit of their adoption and enactment. When, however, all the requirements of the law have been met and bail has been granted, its practical effect upon the administration of the criminal law is to prejudice the State (*Ewing v. U. S.*, 153 C. C. A. 167),

State v. Allen.

in that it changes the relation of the latter to the accused from that of a custodian to one of a mere holder of a moneyed obligation maturing upon the violation of its conditions. Such an obligation is necessarily voluntary. Its most material requisite is the appearance of the accused at the time and place stated. To insure this the principal and sureties bind themselves. An obligation, therefore, of the character here under review, voluntary in its nature, definite in its terms and taken by the State to afford the privilege of freedom to the principal therein, should, upon default being made by the latter, be held binding upon the sureties, although its terms may not conform to the letter of the statute authorizing its execution. To hold otherwise would add nothing to the rights of the accused; and, so far as the State is concerned, it would interfere with the speedy administration of the law. It not infrequently occurs that an accused is held to answer a criminal charge during the term of the court to which his case would be returnable. If, under a strict construction of the statute, he may only be recognized or bound "to appear at the next term of such court," the determination of the case must of necessity be deferred until that time, although he may be informed against or indicted long prior thereto. It was, therefore, never within the contemplation of the framers of our criminal code that the statute should be construed, not solely in the interest of liberty, which was its prime purpose, but to afford an easy loop hole for delay. It is equally evident that it was not intended that a failure to comply with the literal terms of the statute in the framing of a bond thereunder, would not, on account of the nature of the obligation and the purpose of its execution, authorize the release of sureties thereon upon default being made by the principal. The sureties are in no wise injured by such failure. Their obligation is neither lessened nor increased in its requiring the principal to appear at another than the time designated in the statute. This being true, they should not be permitted to escape liability on a mere technicality. Viewed from every

vantage, therefore, this statute, so far as it requires a bond or recognizance to be made returnable to "the next term of the court" before which the offense charged is cognizable, should be held to be directory, and as a consequence liberally construed to effectuate the purpose of its enactment.

This conclusion has been reached by applying the well established rules of interpretation to this statute in the light of its character and purpose.

A cogent reason for the correctness of this conclusion, as to the manner in which the statute should be construed, is to be found in the statute of amendments or Jeofails especially applicable to bonds and recognizances. It is, so far as applicable to the matter at issue, as follows: "No proceeding upon a recognizance shall be defeated, nor shall judgment thereon be prevented or arrested, on account of any defect of form, omission of recital, condition of undertaking therein, . . . or of any other irregularity, so that it be made to appear from the whole record or proceeding that the defendant was legally in custody, charged with a criminal offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate at a term or time specified for trial." [Sec. 5019, R. S. 1909.]

This statute is as much a part of that authorizing the giving of bonds or recognizances as if incorporated into the text of the latter. In fact, to accomplish its purpose, it should be read into that statute in construing same. Thus read, it eliminates from consideration any contention as to a literal interpretation, and leaves, as essentials to determine the sufficiency of the obligation, the legal custody of the accused, to be ascertained from the entire record; his discharge by reason of the giving of the obligation; and that he thereby agreed, and his sureties bound themselves, that he would appear before the court for trial at a time or term specified. These essentials affirmatively appear in the bond at

Burke v. Murphy.

bar; and it will be seen that those required by legislative declaration are the same as those which reason declares should exist in a liberal interpretation of the statute in the absence of such declaration.

From all of which it follows that the surety herein has asserted no sufficient reason for his discharge from the obligation he voluntarily entered into. His contention being devoid of substantial merit, the judgment of the trial court should be affirmed, and it is so ordered.

All of the judges concur.

MARY BURKE and JOHN W. ENNIS v. THOMAS MURPHY and ELLEN DROMEY, Appellants.

Division Two, July 16, 1918.

1. **CONVEYANCE: Deed to Husband and Wife: Title in Survivor.** The owner of land and his wife conveyed his land to their daughter, and the daughter by another deed conveyed it to her father and mother. *Held*, that the last deed created an estate by the entirety in the father and mother, and upon the father's death the entire legal fee simple estate remained in the mother.
2. ———: ———: **Intended as Mortgage: Presumption: Character of Proof.** The presumption of law is that a warranty deed regular in form is not a mortgage, but was intended to be what it purports to be, and it will not be decreed to be a mortgage unless the presumption is overcome by clear and convincing proof.
3. ———: ———: ———: **No Debt.** A conveyance cannot be held to be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of an existing or future obligation.
4. ———: ———: ———: **Bond for Support.** A deed from the owner of land to his daughter will not be decreed to be a mortgage, when construed in conjunction with a bond of even date executed by the daughter by which she obligated herself to support her father and mother during their lives and to permit them to remain upon and use the land as a home, and to pay \$1500 in case she defaulted in the performance of the obligation. There was no debt or obligation from the grantor to the grantee.

Burke v. Murphy.

5. **ESTATE BY ENTIRETY: Claim of Homestead: Waiver.** A widow, who does not know that she is the owner of an estate by the entirety in the land, does not waive her fee simple title to the entire estate by claiming a homestead interest after her husband's death.
6. ———: **Waiver.** There can be no waiver without a knowledge of the rights waived and an intention to waive them.
7. ———: **Estoppel: Prejudicial Misleading.** If the surviving widow, to whom and her husband a conveyance of an estate by the entirety had been made, by claiming a homestead in the land did not cause her husband's heirs to do or to refrain from doing anything which worked to their financial loss or prejudice, they cannot invoke the doctrine of equitable estoppel.
8. ———: **Fraudulent Conveyance: Raised by Party Without Interest.** The point that a deed was fraudulently procured by the grantees cannot be raised by persons who will in no wise be benefited if the deed is set aside. Where a valid warranty deed was made by a daughter to her father and mother, the children of the said father by a former marriage cannot raise the point that a deed by the surviving widow to her said daughter was fraudulently procured, since if it were set aside the title would not pass to them, but to the heirs of the grantor.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

L. F. Cottey and *J. C. Dorian* for appellants.

(1) The conveyance from James Murphy and wife to their daughter, dated November 5, 1874, was a mortgage, because it was made by the parents as security to their daughter for the performance by her of the stipulations contained in the defeasance, of same date and filing, wherein the daughter agreed to maintain her father and mother as contractors, for the payment of said property, during their natural lives in decency and comfort, and that the cancellation of the defeasance (called a bond and agreement), two days after it was filed, operated to nullify and cancel the mortgage. *O'Neill v. Capelle*, 62 Mo. 207; *Book v. Beasly*, 138 Mo. 463; *Reilly v. Cullen*, 159 Mo. 329. The recent case of *Brightwell v. McAfee*, 249 Mo. 562, is clearly in point

Burke v. Murphy.

and decisive of our contentions in the instant case. (2) It is manifest that the conveyance from the father (the mother joining merely to convey her dower under the old form of acknowledgment), to the daughter, was the sole consideration for the contemporaneous agreement, or defeasance, between the father and daughter; and that the cancellation of the latter, *ipso facto*, nullified the former. That was the construction the parties put upon it at the time, and for thirty-five years thereafter. It is the business of a court to ascertain and determine the meaning and intention of the parties in making an agreement. The courts are not at liberty to disregard the construction which the parties to a deed, by their acts and conduct, have placed upon it for a long period of years. *Patterson v. Camden*, 25 Mo. 22; *St. Louis Gas Co. v. St. Louis*, 46 Mo. 130; *Jones v. DeLassus*, 84 Mo. 545; *Depot Co. v. Railway Co.*, 131 Mo. 305; *Williams v. Santa Fe Ry. Co.*, 153 Mo. 534. (3) If Mary Murphy, Sr., and her sole heir at law, Mary Burke, plaintiff, acquired any right under the conveyance of November 10, 1874, then such rights have been waived by the acts and conduct of the parties. And by parties is meant both mother and daughter, because the daughter is the sole beneficiary of her mother, and, according to the record, the acts and conduct of the daughter, with respect to said lands, go hand in glove, with the acts and conduct of her mother, with respect to said lands. The facts authorize the application of the doctrine of waiver in this case. *Hayes v. Manning*, 263 Mo. 1.

John W. Ennis, pro se and for other respondents.

(1) A deed made to a husband and wife creates an estate by the entirety and the title passes to the survivor. *Gibson v. Zimmerman*, 12 Mo. 385; *Gardner v. Jones*, 52 Mo. 68; *Frost v. Frost*, 200 Mo. 480. (2) The law presumes that a deed, absolute on its face, is what it purports to be and the burden is on the grantor to overcome the presumption by clear and convincing evidence. A conveyance cannot be construed to be a mortgage if there is no debt of the grantor due to the grantee. The

Burke v. Murphy.

infallible test is that there must be a debt due from the grantor to the grantee. *Duell v. Leslie*, 207 Mo. 658; *Jones v. Hubbard*, 193 Mo. 163; *Bobb v. Wolff*, 148 Mo. 335; *Book v. Beasley*, 138 Mo. 460; *Whelen v. Tobner*, 71 Mo. App. 371; *Worley v. Dryden*, 57 Mo. 226; *Hargadine v. Henderson*, 97 Mo. 375; *Brightwell v. McAfee*, 249 Mo. 562. (3) The question of waiver is mainly a question of intention which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless it is so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. *Gillen v. Insurance Company*, 178 Mo. App. 106; *Fulkerson v. Linn*, 64 Mo. App. 653; *Francis & Hunter v. A. O. U. W.*, 150 Mo. App. 355; *Reed v. Bankers' Union*, 121 Mo. App. 419. *Mary Murphy, Sr.*, could not waive that of which she was ignorant, nor could she be estopped where her course of conduct had led no one to change his condition to his prejudice. *Seek v. Haynes*, 68 Mo. 15; *Hayes v. Manning*, 263 Mo. 1; *Fairbanks Morse Company v. Baskett*, 98 Mo. App. 64; *Belknap v. Bender*, 75 N. Y. 453. If no one has been misled to his hurt, if no injury has arisen from the conduct, declarations or silence of a party, he will not be estopped from contradicting them, even though they would be conclusive against his right if not contradicted. *Harrison v. McReynolds*, 183 Mo. 548; *Bramell v. Adams*, 146 Mo. 83; *Acton v. Dooley*, 74 Mo. 67; *Blodget v. Perry*, 97 Mo. 273; *Mueller v. Kaeffmann*, 84 Mo. 329. Where a homestead is set off to a widow who owns the fee simple title to the land set apart as homestead, neither the widow nor her heirs are estopped from claiming fee. *Hendrix v. Musgrove*, 183 Mo. 300; *Case v. Metzenburg*, 109 Mo. 311; *Ketchum v. Christman*, 128 Mo. 38; *Payne v. Daviess County Savings Association*, 126 Mo. App. 599; *Seek v. Haynes*, 68 Mo. 15.

WILLIAMS, J.—This is a suit under Section 2535, Revised Statutes 1909, to determine the title to the

Burke v. Murphy.

north half of the southeast quarter and the south sixty-five acres of the northeast quarter of section eighteen, township sixty-three, range twelve west. Knox County, Missouri.

A trial was had before the circuit court of Knox County, which resulted in a decree in favor of plaintiffs. Thereupon defendants duly appealed.

The petition is in the usual form. The answer contains six counts and alleges affirmative equitable defenses. No questions are raised as to the pleadings. If it becomes necessary we will refer to them in the course of the opinion.

James Murphy may properly be considered as the common source of title. He was twice married. His second wife was Mary Murphy, Sr. The defendants, Thomas Murphy and Ellen Dromey, were the only children by his first wife. Plaintiff Mary Burke (*nee* Murphy) was the only child by the second wife. Plaintiff John W. Ennis claims a one-third interest through mesne conveyances from the common source of title. Plaintiff Mary Burke claims a two-thirds interest in the same manner. Defendants contend that James Murphy did not succeed in disposing of this land by deed, but that he died seized of said land—hence the two defendants and plaintiff Mary Burke as the sole surviving heirs each have an undivided one-third interest in the land.

The legal title stands in the plaintiff, as will appear from the following conveyances of this land, to-wit:—

(1) Warranty deed dated November 5, 1874, from *James Murphy* (common source) and Mary Murphy, Sr., his wife, to Mary Murphy, Jr. (now Mary Burke, one of plaintiffs).

(2) Warranty deed dated November 10, 1874, from Mary Murphy, Jr., to *James Murphy and his wife, Mary Murphy, Sr.*

(3) (*James Murphy* died about 1877).

(4) Warranty deed dated June 14, 1913, from Mary Murphy, Sr., to *John W. Ennis* (plaintiff), conveying undivided one-third interest in the land.

Burke v. Murphy.

(5) Warranty deed dated June 14, 1913, from Mary Murphy, Sr., to *Mary Burke* (plaintiff), conveying an undivided two-thirds interest in the land.

The evidence upon the part of the plaintiffs further tends to show that Mary Murphy, Sr., died about two months after the execution of the two deeds last above mentioned; that she was 96 years old at the time of her death; that from the death of James Murphy down to the date of her own demise she was in the possession of this land; she signed the deeds by mark and there was some evidence tending to show that she could neither read nor write; the evidence further tends to show that her mind was normal on the date of the execution of the deeds above mentioned.

Defendants' evidence tends to establish the following facts:

At the February term, 1878, of the Knox County Probate Court and upon the application of said Mary Murphy, Sr., as the widow of James Murphy, deceased, said court made an order appointing commissioners to set off and assign to said widow her homestead in said lands (and other lands). At the May term, 1878, said commissioners reported that they had set off as such homestead the land now in controversy. Said report was by the court approved and ordered filed.

At the June (1903) term of the Knox County Circuit Court Thomas Murphy and Ellen Dromey (defendants in the case at bar) instituted suit against said Mary Murphy, Sr., (now deceased), and Mary Burke (plaintiff in the case at bar) and her husband to enjoin said defendants from cutting timber therefrom and otherwise committing waste upon said land. The petition in that suit, among other things, alleged that James Murphy died seized of the fee simple title to said land and that said Thomas Murphy, Ellen Dromey and Mary Burke were the sole heirs of said deceased and each owned an undivided one-third interest therein subject to the homestead interest therein of the widow, Mary Murphy, Sr. The joint answer of Mary Burke and Mary Murphy, Sr., admitted the title as alleged in

Burke v. Murphy.

the petition in that suit, but denied that they were committing waste on said land. A trial was had resulting in a judgment for the defendants therein.

On October 3, 1912, Mary Murphy, Sr., Mary Burke and husband and Ellen Dromey instituted, as plaintiffs, a partition suit involving the land now in dispute. Thomas Murphy and his wife were made defendants in that suit. The petition therein alleged the title to be in Mary Burke, Thomas Murphy and Ellen Dromey as the sole heirs at law of James Murphy, deceased, subject to the homestead interest of the widow Mary Murphy, Sr. The petition alleged that the widow joined as plaintiff and consented and asked that the land be partitioned. The petition prayed that the land be sold and the proceeds divided between the parties according to their respective interests as above defined. Trial was had resulting in an interlocutory decree finding the title as alleged, fixing the value of the homestead interest and ordering that the land be sold and the proceeds be divided according to the respective interests of the parties. (This interlocutory decree in partition was afterwards upon motion of Mary Murphy, Sr., set aside. The said motion will be hereinafter copied).

Defendants also offered in evidence the record of a certain bond between James Murphy and Mary Murphy, Jr., which was filed for record November 7, 1874, the same date that the deed from James Murphy and wife to Mary Murphy, Jr., was filed. Said bond as shown by the record was as follows:—

“Greensburg, November 5, 1874.

“This Bond made and entered into by and between James Murphy and Mary Murphy (Jun.), all of the county of Knox and State of Missouri, Namely Whereas James Murphy has this day made and executed his deed to Mary Murphy, (Jun.) for one hundred and five acres of land to-wit:—

“65 acres on the South side of the NE qr of Section 18 and 80 acres the N ½ of the SE quarter of Section 18 and 20 acres the East end of the South-half of SE quarter of Section 18, all in Township Sixty

Burke v. Murphy.

three (63) of Range Twelve (12) in Knox County, Mo.

"Also the following personal property I have sold and delivered to her own use and behalf forever, to-wit: Seven cows 4 two year old cattle 2 steers and 2 heiffers 3 yearling stears and one heifer. 8 head of calves 2 head of horses, one colt, one waggon & Harness 27 head of fat Hogs, 20 head of stock hogs more or less, 2 breaking plows 1 Shovel Plow 1 Cultivator. 1 Dimond Plow 1 mower 1 corn Planter one hundred Bushells of Wheat and all other personal property & produce on the farm and owned by the said James Murphy at his date, and of the above described personal property known as the property own by him at this date Subject however to the following conditions, the said Mary Murphy (Jun) Binding herself in the full amount of \$1500 if default be made in this Bond and agreement To Wit She agrees and binds herself to maintain James Murphy & Mary Murphy (her Father and Mother) as contractors for the payment of said property during their natural lives in decency and comfort permitting them to remain on said Real Estate as their home and James Murphy to have the use of said lands and said personal property to use as he sees proper during his and his wifes lives.

"Given under our hands and seals on this the 5th day of November A. D. 1874.

his

"James x Murphy (seal)
mark

her

"Mary x Murphy Jun. (seal)."
mark

On the margin of the record of the above bond was the following entry:

"We the undersigned acknowledge full satisfaction for the within Bond and hereby release the within named property given under our hands this Nov. 9th, 1874.

his

"James x Murphy (seal)
mark

Burke v. Murphy.

her
"Mary x Murphy Jun. (seal.)
mark

"Attest Ed. M. Randolph
Clerk & Recorder, (seal)"

On March 6, 1893, Mary Burke, Jr., and husband, by warranty deed, conveyed to Thomas Murphy a one-third interest in the east half of the southeast quarter of the southeast quarter of Section 18, Township 63, Range 12, Knox County, Missouri, containing twenty acres more or less. (This twenty acres is not involved in the present suit. It was included in the deed (heretofore mentioned) from James Murphy and wife to Mary Murphy, Jr., and was also included in the deed (heretofore mentioned) from said Mary Murphy, Jr., to James Murphy and wife).

Patrick Powell testified that in the fall of 1874 he had a conversation with James Murphy as follows: (Murphy): "I made all my property to Mary." (Powell): "Jim, what did you do that for, to beat your creditors?" (Murphy): "No I done it to save myself from Tom; there is more of Tom's money in that farm than mine, and if Tom sued me he could put me out of house and home." (Powell): "Tom will never do that." (Murphy): "Do you mean that?" (Powell): "Of course." (Murphy): "If that is the case I will believe you and I will go in tomorrow or the day after and put it back in my name." Later Murphy told Powell "that he did put it back in his own name." Upon cross-examination it appeared that this witness's memory of dates was not very accurate. He was unable to say whether he left Missouri in the year 1839 or 1879, and when it was that he made visits back to the State.

Thomas Murphy (defendant) was offered as a witness to prove transactions occurring between himself and his deceased father, James Murphy, with reference to the land in dispute. This offer was, upon plaintiff's objection, excluded, and defendants saved an exception.

On October 26, 1874, James Murphy and wife executed to said Thomas Murphy a warranty deed conveying forty acres of land other than that involved in the present suit.

In rebuttal the plaintiff offered the following evidence:

The motion, filed by Mary Murphy, Sr., in the partition suit asking that the interlocutory decree be set aside, was verified by her counsel and omitting verification and formal parts was as follows:

“Comes now Mary Murphy, a plaintiff herein, by her attorney of record, John W. Ennis, and moves the court to reopen and review the interlocutory decree of partition heretofore rendered in this cause, and that said decree of partition be vacated and set aside by the court, for the following reasons to-wit:

“(1) Because the said decree of partition was rendered by this court under a mis-statement and mistake of fact as to the state of the record title to lands so partitioned.

“(2) Because the said plaintiff, Mary Murphy, is the sole owner of and is now in the possession of all the lands so partitioned, and the other parties to this suit have no interest of any kind or nature therein.

“(3) Because the said plaintiff Mary Murphy, is an aged and illiterate widow unable to read or write and has acted and permitted her attorneys to act for her under a mistake of fact, as to the state of the record title to the lands sought to be partitioned, in this, that she was led to believe that she was only entitled to a homestead interest in the said lands sought to be partitioned, when in truth and in fact she is the sole owner, in fee simple, of all said lands; that ever since the death of her husband James Murphy, who owned said lands, during his lifetime, jointly as tenant by the entirety, with this plaintiff, Mary Murphy, it has been represented to this plaintiff that she was only the owner of a homestead interest in said lands, and this plaintiff has ever since the death of her said husband so believed until long after the rendition of the said decree

Burke v. Murphy.

of partition herein; that since the rendition of said decree this plaintiff has learned, and now avers the facts to be that she is the sole owner, in fee simple, of all the lands sought to be partitioned in this suit.

“Mary Murphy by John W. Ennis, her attorney.”

The above motion was sustained by the court, and the interlocutory decree in partition was set aside and the cause was ordered continued.

After the taking of testimony in the case at bar had been closed by both sides the defendants were permitted to call John W. Ennis, one of the plaintiffs, as a witness, and to prove by him that he paid no money consideration for the deed whereby he received from Mrs. Murphy the undivided one-third interest in said land. Upon cross-examination he testified as follows:

“A. I visited Mrs. Murphy in the month of June after the adjourning of circuit court, and I had visited Mrs. Murphy before the convening of the circuit court, I had discovered that the title to the land was in her name, and I had examined the deed and went to see her and informed her of the effect of the deed. She didn't know that a deed made to herself and husband vested the title in her and I informed her of that fact and told her the land was fixed under the partition proceedings, and if it was sold, her fee simple interest in the land would be destroyed, then she would lose her interest in the property. I proposed to her I would procure the setting aside of the decree of partition and would make all due effort to establish her interest in the property as a fee simple interest in the property. The substance of the agreement was if I did get the decree set aside, I should have a one-third interest in the property. That was my contract with Mrs. Murphy.”

I. It appears from the evidence that the legal title to the land involved is in the plaintiffs. James Murphy (the common source of title) conveyed the land involved,

together with twenty acres of other land not here involved, to his daughter Mary Murphy, Jr. Thereafter the daughter, Mary, conveyed the land here in controversy (together with the twenty

**Estate by
Entirety.**

Burke v. Murphy.

acres not in controversy) to James Murphy and his wife Mary Murphy, Sr. Under the law this created an estate by the entirety in James Murphy and Mary Murphy, his wife. Upon the death of James Murphy, occurring in 1877; the entire legal fee simple estate remained in Mary Murphy, the wife. [Frost v. Frost, 200 Mo. 474, l. c. 483.] Thereafter on June 14, 1913, she conveyed one-third of the legal title to plaintiff Ennis, and two-thirds thereof to her only child, Mary Burke, one of the plaintiffs.

As we understand appellants' contentions, they undertake to defeat the legal title as above set forth, on the following grounds, to-wit:

(1) That the deed from James Murphy and wife to Mary Murphy, Jr. (when construed in conjunction with the bond of even date therewith), should be decreed to be a mortgage; and that the equitable title remained in said James Murphy at the time of his death, and that his three children, as his sole heirs, are now each entitled to a one-third interest therein, the homestead interest of the widow having terminated upon her death.

(2) Even though the above deed is not decreed to be a mortgage, yet said Mary Murphy, Sr., having claimed only a homestead estate in the land from the time of her husband's death in 1877 up until just before she made the deeds to the plaintiffs in 1913, waived her title in fee simple, and her grantees received no title. And further that said grantees are estopped from claiming said title.

The above propositions will be discussed in their order.

II. Should the deed dated November 5, 1874, from James Murphy and wife to Mary Murphy, Jr., be decreed a mortgage? We think not. The deed is a warranty

deed in regular form. The law presumes
Intended that the instrument was so intended.
as a Mortgage. [Bobb v. Wolff, 148 Mo. 335, l. c. 344.]

The burden is upon the grantor or those claiming under him to overcome this presumption by clear and con-

Burke v. Murphy.

vincing proof. [Brightwell v. McAfee, 249 Mo. 562; Bobb v. Wolff, *supra*.]

The very purpose of a mortgage is to *secure* the payment of a debt or the performance of an obligation. In the case of Duell v. Leslie, 207 Mo. 658, this subject is fully discussed and authorities reviewed. In that case the following quotation from Jones on Mortgages was quoted with approval, viz:

“There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view it is essential that there be an agreement, either express or implied, on the part of the mortgagor or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money, either on account of a pre-existing debt or a present loan.”

Commenting on the above rule the court said: “This is the universally recognized doctrine applicable to the essential requisites of a mortgage.” [*Ibid.*, l. c. 668.]

In the case of Sheppard v. Wagner, 240 Mo. 409, l. c. 433, the court quoted with approval the following statement of the rule:

“It may be taken as universally true in law that no conveyance can be a mortgage unless it is made for the purpose of securing the payment of a debt, or the performance of a duty either existing at the time the conveyance is made or to be created or to arise in the future.”

The two above quoted excerpts supplement each other and when read together give a clear understanding of the rule. To the same effect are the following authorities: Book v. Beasley, 138 Mo. 455, l. c. 461; Bobb v. Wolff, 148 Mo. 335, l. c. 344; Worley v. Dryden, 57 Mo. 226, l. c. 232.

Measured by the above rule do the facts in the case show the deed to have been executed as a mortgage? We think not. The evidence shows that James Murphy and wife made a straight out conveyance of this land by warranty deed to their daughter. In consideration of this agreement the daughter executed the instru-

ment, referred to in the evidence as a bond, whereby she obligated herself to support her father and mother during their natural lives and to permit them to remain upon and to use the land as a home. The bond provides that if she defaults in the performance of the foregoing obligation she shall pay the sum of \$1500.

It therefore appears that the grantors fully performed their portion of the contract by conveying to the daughter the land, and there remained no outstanding debt or obligation, or the provision for the future existence of a debt or obligation, from the grantors to the grantee. The outstanding debt or obligation was all the other way. It was one owed by the grantee to the grantors. Under such facts it cannot be said that the grantors in said deed occupied the status of mortgagors with reference to the property. Whether they possessed rights created by the bond which were similar to that of mortgagees (27 Cyc. 981) we need not here determine for two reasons, viz: (a) Appellants can only obtain relief by showing that the apparent grantors were mortgagors and not mortgagees; (b) The bond was afterwards by consent of all concerned, duly released of record.

III. Did Mary Murphy, Sr., waive her title as tenant by the entirety by claiming a homestead interest in the land? We think not.

We are not aware that it has ever been held that a legal fee simple title to land can be divested by the process of a waiver when the acts constituting a waiver (as that term is used in the law) are unaccompanied by other acts or facts sufficient to invoke the rules of estoppel. Appellants rely upon the case of *Hayes v. Manning*, 263 Mo. 1, in support of their contention. That case applies the doctrine of waiver to the equitable rights to possession claimed by certain trustees of church property. That case was not dealing with a situation similar to the one here involved. It was not intended by that opinion and nothing therein stated can be properly construed as holding that the doctrine of waiver in and of itself will ever operate to divest the

Burke v. Murphy.

legal title of land. But even though it be conceded *arguendo* that the doctrine of waiver could work a divestiture of a legal fee simple title to land, the facts here involved would not call for the application of the rule. Waiver involves a full knowledge of the rights waived and an intention to waive the same. [Hayes v. Manning, *supra*, l. c. 46.] There is no proof in this record that Mary Murphy, Sr., understood her rights under the deed to herself and husband, prior to 1913. In fact, the evidence conclusively shows we think that she did not know that she owned the fee simple title to the land until just a short time prior to the execution by her of the conveyances conveying the title to plaintiffs. The evidence shows that Mary Murphy, Sr., was an illiterate woman and that although, in fact, she owned the fee simple title to the land she thought she had only a homestead interest in the land. She knew no better until advised by her attorney in 1913 and just prior to the execution by her of the deeds conveying the land to the plaintiffs.

Neither can appellants successfully invoke the doctrine of estoppel. It does not appear from the evidence that this conduct on the part of Mary Murphy, Sr., in claiming a homestead in the land, caused either of the defendants to do or to refrain from doing anything which worked to their financial loss or prejudice. There is therefore absent from the case one of the essential prerequisites of the doctrine of equitable estoppel. [Seek v. Haynes, 68 Mo. 13, l. c. 17; Thompson v. Lindsay, 242 Mo. 53, l. c. 76.]

IV. Appellants further contend that the two deeds procured by plaintiffs on June 14, 1913, from Mary Murphy, Sr., were fraudulently procured and should be set aside.

The conclusion reached above renders a discussion of this point unnecessary. As found above the title to said land was in Mary Murphy, Sr., at the time said deeds were executed. Even if said deeds were set aside the title would then stand in the heirs of said grantor. The appellants are not

**Fraudulent
Conveyance.**

heirs of said grantor and hence their interest is not sufficient to authorize them to maintain the point. The respondent Mary Burke is the sole heir at law of said grantor. She alone would receive the entire title if said deeds were set aside. But she makes no complaint. On the other hand she takes the position that the deeds were valid. It follows that the question becomes a moot one, the determination of which is unnecessary to a decision of the case.

We find no error in the case. It therefore follows that the judgment should be affirmed. It is so ordered. All of the judges concur.

ED. B. WIGGINTON et al. v. E. B. RULE et al.,
Appellants.

Division Two, July 16, 1918.

1. **WILL CONTEST: Testamentary Incapacity: Sufficient Evidence.** The testimony in this case, which was brought by children to set aside the will of their father, seventy-eight years old, made eighteen days before he committed suicide, is set out at length, and the conclusion reached that there was sufficient evidence to authorize the submission of the issue of *devisavit vel non* to the jury.
2. ———: ———: **Delusion: Sufficient Evidence.** The evidence in this case was sufficient to justify a submission to the jury of the question of whether testator, at the time he executed his will, was laboring under an insane delusion that undue intimate relations existed between his son-in-law and a young girl who was a member of his family, that such false and mistaken conception was not based upon fact, that he did not have before him evidence acting upon which any normal or rational mind would have formed such belief, and that the will was the offspring of such delusion.
3. ———: ———: **Insane Delusion: Pertinent Evidence.** There is no such thing as a delusion founded upon substantial facts; but it is not sufficient for a ruling as a matter of law that testator possessed no insane delusion, that testimony be produced at the trial that he had some evidence, even though of an unsubstantial character, for his belief that illicit relations existed between his son-in-law and a girl in his family; but the question for determination is, did he have before him at the time he executed the

Wigginton v. Rule.

will evidence acting upon which any normal or rational mind would have formed such a belief? If there is testimony from which the jury would be justified in finding that testator was insane on the subject of such an illicit intimacy, and that the will was the fruit of such insanity, then the existence of the delusion at the time the will was made, being a mistaken and false misconception, becomes a question for the jury.

4. ———: ———: **Subsequent Occurrences.** There is no hard-and-fast rule as to the incompetency of evidence on account of remoteness. Post cards written by testator a few days after execution of his will, to his granddaughter, there being no noticeable change in his mental condition between the two events, are competent evidence bearing on his testamentary capacity.
5. ———: ———: **Opinion of Lay Witnesses: Self-Invited Error.** An appellant, who by his conduct at the trial invites the error of which he subsequently complains, whether it be in the instructions asked or the evidence produced, is not on appeal entitled to a ruling that such error was prejudicial. It is an invasion of the province of the jury to permit lay witnesses in a will contest to give their opinions that testator did not have sufficient mind to know the value of his property or to realize his relations towards his children; but if proponents themselves open wide the door to the admission of such opinions and invite them, both by the direct and cross-examination of witnesses, they will not on appeal be entitled to complain that the admission of the opinions of respondents' lay witnesses was prejudicial error.
6. ———: ———: **Inheritable Interest.** It is not error to refuse to instruct the jury that a granddaughter of testator, a daughter of an insane daughter, named as a devisee, will inherit no interest in his estate if the will is set aside, though it contains a correct statement of the law. It could not aid the jury in determining the issue of testamentary capacity.
7. ———: ———: **Formal Execution.** An instruction telling the jury that the will "was executed in conformity with the provisions of the law relating to the execution of wills" should not be given. Since the law requires a will to be executed by one of sound mind, its meaning is too obscure and uncertain; besides, where there is no controversy about the formal execution of the will, the jury need no instruction on the point.

Appeal from Pike Circuit Court.—*Hon. Edgar B. Woolfolk*, Judge.

AFFIRMED.

Robert A. May, J. E. Pew, Frank J. Duvall and Hostetter & Haley for appellants.

(1) The court erred in refusing proponents' instruction directing the jury to find in favor of the will. The testimony showed without contradiction that the testator transacted his business before and after the making of the will in an intelligent, rational and normal manner; that on the day he made the will he understood the business in which he was then engaged; knew the persons who were the natural objects of his bounty, and understood his relations to them; knew what property he owned and of what it consisted and knew what disposition he desired to make of it. The provisions of the will itself are so fair, sane and reasonable that they constitute the strongest possible proof that they emanated from a mind possessing all the elements of testamentary capacity. Therefore the court should have instructed peremptorily to find in favor of the will. *Bounds v. Johnson*, 192 S. W. 972; *Winn v. Grier*, 217 Mo. 420; *Hamon v. Hamon*, 180 Mo. 685; *Cash v. Lust*, 142 Mo. 630; *Sayre v. Princeton*, 192 Mo. 95; *Gibony v. Foster*, 230 Mo. 106; *Weston v. Hanson*, 212 Mo. 248; *Southworth v. Southworth*, 173 Mo. 59; *McFadin v. Catron*, 120 Mo. 252, 138 Mo. 197; *Maddox v. Maddox*, 114 Mo. 35; *Jackson v. Hardin*, 83 Mo. 175; *Schierbaum v. Schemme*, 157 Mo. 1; *Hughes v. Rader*, 183 Mo. 630; *Turner v. Anderson*, 260 Mo. 1; *Conner v. Skaggs*, 213 Mo. 334; *Riley v. Sherwood*, 144 Mo. 355; *Techenbrock v. McLaughlin*, 209 Mo. 539; *Farmer v. Farmer*, 129 Mo. 530; *Story v. Story*, 188 Mo. 127. (2) The court erred in instructing the jury as to the alleged "insane delusion." The testimony falls far short of establishing the fact that the belief of the testator in the existence of improper relations between his son-in-law and the girl was in point of fact an "insane delusion" within the meaning of the law. "No belief that has any evidence for its basis, is in law an insane delusion." *Stull v. Stull*, 96 N. W. (Neb.) 202; *Conner v. Skaggs*, 213 Mo. 348; *Sayre v. Trustees Princeton University*, 192 Mo.

Wigginton v. Rule.

126; *Fulton v. Freeland*, 219 Mo. 518. To invalidate a will it must be produced by the monomania under which the testator was laboring. *Benoist v. Murrin*, 58 Mo. 329. The alleged insane delusion in the instant case was directed against the son-in-law; he was not one of the natural objects of the testator's bounty; he would not have inherited anything had the testator died without a will; there is no testimony that the testator ever at any time intended to will to the son-in-law any property. Therefore it is idle to contend that the will was the offspring of the delusion, conceding it to have been a delusion. *Merrill v. Rush*, 33 N. J. Eq. 537; *Stockhouse v. Horton*, 15 N. J. Eq. 202. (3) The admission of postcards, written by testator on the day of and immediately prior to his death, was erroneous and very prejudicial. A declaration of a testator, whether oral or in writing, made after the execution of the will and having no connection with the will or its provisions, and containing as the exhibits complained of in the case at bar, prejudicial matters to the effect that the testator had mistreated and wronged his granddaughter and was remorseful because of such wrong and mistreatment, is highly prejudicial, and is clearly error. *McFadin v. Catron*, 120 Mo. 267. (4) It was error to permit lay witnesses to testify and give their opinion to the effect that the testator did not have sufficient mind to know the value of his property or to realize his relations toward his children, or to appreciate the obligations to his family, or the relations to his family, because these matters left it for the witness to conclude what were his proper obligations to his family and to his children, and what were the proper relations he should sustain toward them, and was to that extent an invasion of the province of the jury. Declarations of a testator are proper to be given in evidence only as they bear upon the condition of his mind and the state of his affections. The purpose which they subserve is to furnish an insight into the actual condition of the testator's mind at the very time of the execution of the will. The more remote they are from the date of the execution of the

will the less value is ascribed to them. They are never received as evidence of the truth of the things contained in such declarations. This principle was repeatedly violated during the trial. *McFadin v. Catron*, 120 Mo. 266.

Pearson & Pearson for respondents.

(1) Where there is any evidence of testator's incapacity to make a valid will, whether it be of insanity, partial insanity, or an insane delusion, it is a question of fact, which should be submitted to the jury under proper instructions. *Turner v. Anderson*, 260 Mo. 16; *Wendling v. Bowdin*, 252 Mo. 692; *Ten Broeck v. McLaughlin*, 209 Mo. 538; *Mowing v. Norman*, 204 Mo. 193. (2) If a delusion existed in testator's mind, and dominated him in making his will, as the jury found there was, and did, then testator was incapable, on that account, of making a valid will. *Holton v. Cochran*, 208 Mo. 412; *Knapp v. Trust Co.*, 199 Mo. 667; *Benoist v. Murrin*, 58 Mo. 319. (3) In order that a testator may comprehend the relations which he holds towards those who have claims upon him, no insane delusion should influence his will; unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will, but it may be set aside where the testator's aversion is the result of an insane delusion, and his conduct cannot be explained on any other ground. *Buford v. Gruber*, 223 Mo. 250; *Knapp v. Trust Co.*, 199 Mo. 668. (4) Whenever a person conceives something extravagant, which has in fact no existence whatever, and he is incapable of being reasoned out of this false belief, it constitutes insanity; and if this delusion relates to his property, he is incapable of making a will. *Benoist v. Murrin*, 58 Mo. 323; *Knapp v. Trust Co.*, 199 Mo. 667; *Buford v. Gruber*, 223 Mo. 250; *Holton v. Cochran*, 208 Mo. 421. (5) Where there is any evidence, that the will is the direct offspring of partial insanity, or an insane delusion, under which the testator was laboring at the time of executing the same, and from which he could not extricate himself, the case should be submitted to the

Wigginton v. Rule.

jury, although testator's general capacity be unimpaired. *Knapp v. Trust Co.*, 199 Mo. 668; *Buford v. Gruber*, 223 Mo. 251. (6) The opinion of witnesses, as to testator's mental capacity is the very best evidence that can be adduced before a jury. It approaches to knowledge, and is such knowledge as is proper evidence for the jury. *Appleby v. Brock*, 76 Mo. 316; *Sharp v. K. C. Cable Ry. Co.*, 114 Mo. 100; *State v. Speyer*, 194 Mo. 468; *Huffman*, 217 Mo. 230.

WILLIAMS, J.—This is a suit to set aside, on the ground of testamentary incapacity, the will of Calvin Wigginton, deceased. Trial was had before a jury in the circuit court of Pike County, which resulted in a verdict and judgment setting aside the will. Thereupon the executor and the nieces of testator, who are made defendants in this case, duly perfected an appeal to this court.

The main contention of appellants is that there was not sufficient evidence to submit to the jury the question of testamentary incapacity. For that reason it will be necessary to set forth the facts with considerable detail.

It will be unnecessary to detail the evidence offered by the proponents of the will, since no issue on this appeal is based thereon. In that behalf it is sufficient to say that proponents introduced substantial evidence tending to show that testator was of sound mind at the time the will was made, and that the will was duly executed and witnessed as required by law.

Calvin Wigginton (who for the sake of brevity will be hereinafter referred to as testator) was seventy-eight years of age when he executed his will on August 8, 1914. Eighteen days later he committed suicide by shooting himself in the head with a pistol at a lumberyard in Clarksville, Missouri.

At the time of his death it is stated that he was possessed of real and personal property of the value of about thirty thousand dollars. He left surviving him only two children, a son, Ed. B. Wigginton, and an insane daughter, Ada V. Goodman, wife of Edwin Good-

man. These two children are the plaintiffs in this suit; the insane daughter appearing by her guardian, Edwin Goodman.

The will, after providing for the payment of debts and funeral expenses and after stating that testator had already provided for his son, Ed. B. Wigginton, during his lifetime, disposed of testator's property as follows:

"All the rest, residue and remainder of my estate, whatsoever, and wherever situate, I direct shall be held in trust by my executor, hereinafter named and to be loaned as, in his judgment, may be to the best advantage, the income of which shall be paid by him annually, or oftener, if necessary, toward the maintenance of my daughter, Addie V. Goodman, in such sums as may be necessary to properly care for her. And all of such income, over and above what may be necessary to properly provide for my said daughter, shall be paid, annually, to my granddaughter, Mary O. Goodman. And at the death of my said daughter, Addie V. Goodman, the whole of said income shall be paid annually to my said granddaughter, Mary O. Goodman, and in case she shall die leaving no bodily heirs, then I direct that said trust fund shall be distributed as follows: One-sixth thereof to each of the following named persons, to-wit: My son, Ed. B. Wigginton, and my nieces, Callie Elizabeth Thomas, Olca N. Wigginton, Lucy Wells, Juda Wigginton and Zula Wigginton."

E. B. Rule, of Louisiana, Missouri, was named executor. Mary O. Goodman, mentioned in the will, is a granddaughter of the testator and is the only child of the insane daughter. She was named as defendant, together with the executor and the nieces named in the will. Defendant Mary O. Goodman in her separate answer, however, admitted that the testator was not of sound mind at the time the will was made and that he did not have mental capacity to make a will at that time.

Testator had been a widower for many years and for fourteen years had made his home with his son-in-law, Ed Goodman, who resided on one of the testator's

farms. This household originally consisted of testator, Mr. Goodman and wife, and daughter Mary. About three years before the will was made a young girl by the name of Bertha Howell was taken into the Goodman home as one of the family, also as a companion for the Goodman girl and to help with the house work. A year or so before the will was executed Mrs. Goodman was taken to the insane asylum at Fulton, where she remained.

Everything appears to have been pleasant at the Goodman home up until about April, 1914. Prior to that time the relations between testator and his son-in-law were pleasant. The girl Bertha was then about fifteen years of age, and she and the daughter Mary slept in the living room downstairs. The son-in-law slept upstairs. He was in the habit of removing his shoes in the living room before retiring for the night and would leave his shoes by the stove downstairs. Early in the morning before the other members of the household were up it was his usual practice to come down to the living room, open up the draft on the stove, put on his shoes, start the fire in the kitchen and go about his work.

One morning in April, 1914, the daughter Mary was away from home. The son-in-law came down as usual to build the fire, knocked on the living room door, and Bertha got up and unlocked the door and returned to bed before the son-in-law entered the room. He then entered the room and fixed the fire as usual and left the room. Testator saw him leave the room and sometime later told him that he did not think it was proper for him to go into the room while the girl was there in the bed. There was nothing in the evidence to show that anything improper occurred other than the above.

A few weeks later, the granddaughter Mary was entertaining a young man in the parlor one Sunday evening about nine p. m. Bertha was in bed in the living room. The folding-doors between the parlor and

living room were closed. The son-in-law was upstairs. The testator was supposed to be in his room in another portion of the house. All at once a "terrible crash" was heard. Bertha raised up in bed, Mary opened the folding-doors and rushed into the room, and the son-in-law upstairs called out, "What is the matter down there?" When Mary rushed into the room she found the testator standing at the foot of Bertha's bed with a large post maul in his hand, which he had used in breaking open the outside door of the room. When he rushed up to the bed he asked Bertha where Ed Goodman was. He stared at Mary a few seconds and then left the room without saying anything further. In a few seconds the son-in-law went downstairs and to the testator's room and asked him what was the trouble. Testator replied, "Nothing, nothing, nothing." From that time on testator continued to tell his neighbors and persons with whom he would meet that he thought his son-in-law was intimate with the girl Bertha. He also told them that one Sunday afternoon no one was at the house except his son-in-law and Bertha and a little neighbor girl about eight years old, and that Bertha sent the neighbor girl to a near-by house with a note. Testator saw the little girl on the road with the note, and said that the little girl told him that Ed Goodman was lying across the foot of Bertha's bed. The granddaughter Mary and the girl Bertha and the son-in-law Mr. Goodman each had many talks with the testator and tried to explain to him and reason with him that there was nothing wrong between the son-in-law and the girl, but they were unable to reason with the testator on the subject. Many of the witnesses to whom the testator told his troubles testified that testator was "off" on this subject, and that he became very much excited and agitated and nervous and did not talk intelligently when he was talking about the matter. Many of the neighbors tried to reason with him about the matter and to persuade him that there was nothing wrong, but they were unable to do anything with him in this regard.

It also appears in the evidence that testator was "in love" with the girl Bertha. That when she finally left the Goodman home and went to Mexico on a visit he wrote her a letter every day, and one day he wrote her two letters. It also appears that he wrote her a letter a day or two prior to his death. At another time he went to one of the banks in Louisiana and tried to borrow three thousand dollars, stating that he was going to send the money to Bertha for her use in buying a farm for herself. In talking to the banker he admitted that he was in love with the girl, and when asked why he did not marry the girl stated that he could not because he had promised someone that he would never marry, that he had offered up prayer to be relieved from this promise, but did not get any satisfaction or any release by that method.

About three months prior to the time the will was made the testator owned several hundred acres of farm land in Pike County. Prior to that time he had been a successful farmer and was considered a very shrewd business man. About May 26, 1914, testator deeded to one Robert Beasley, his nephew, a four-hundred-acre farm, the consideration being one dollar and love and affection. It appears that the testator raised Mr. Beasley when he was a young boy, and there was also some evidence that he thought as much of him as he did of one of his own children.

On July 6, 1914, testator gave his son, Ed. B. Wigginton, one of the plaintiffs herein, a valuable farm near Clarksville, Missouri, consisting of about 130 acres and also transferred to him seven shares of bank stock.

About August 1, 1914, testator sold the 240-acre farm known as the "Jim Ed. Griffith farm" to Doug Burns for the price of seventy dollars per acre. Many witnesses testified that this land was then worth one hundred dollars per acre (one or two witnesses said it was worth about seventy dollars per acre).

The evidence further shows that testator made four wills during the last three months of his life. All of the wills were drawn by an attorney who had not been

in the habit of attending to testator's law business. The first will was executed June 16th, the second July 9th, the third August 4th, and the fourth and final one, which is now in contest, August 8th. It appears, however, that the number of wills was caused by testator giving away and selling some of his farms which he had specifically devised in prior wills, and when he would dispose of a farm which he had specifically devised he would then go to the attorney and have a new will drawn. There were also some other changes made in the will. The placing of the property in trust was not provided in the first wills. The evidence upon the part of proponents undertakes to explain this by showing that in this community another young girl had been left a fortune and had run through with it within a short time after being married, and that the testator in order to avoid a similar occurrence with his granddaughter suggested that a trust be provided.

Mr. E. B. Rule, named as executor in the will, was cashier of the Mercantile Bank of Louisiana. Mr. May, the attorney who drafted the will, occupied offices above said bank. The testimony of both Mr. Rule and Mr. May tends strongly to prove that the testator was of sound mind at the time the will was made. Testator told Mr. Rule, however, that one of his reasons for making the will the way he did was to keep his son-in-law from having any benefit in any of his property.

Mr. Jasper Rubameier, one of proponents' witnesses, on cross-examination testified that the last year of testator's life he had a different look out of his eyes, that his face was drawn, and that he was more nervous and neglected his business. That on August 3, 1914, testator, in saying good-bye to the witness, cried and told him that if he never saw him any more he could have certain horses. This witness was one of testator's tenants, and stated that testator during the latter part of his life did not look after his farm as he usually did. This witness said "I kinda thought there was something wrong with him, I couldn't make out that it was." The witness said that the testator first began to act in this

Wigginton v. Rule.

manner in April, 1914, and he thought that testator must have been "off his mind."

James A. Goodman, a farmer whose farm adjoined the Griffith farm formerly belonging to testator, was a witness for the proponents. He testified that about August 1, 1914, testator told him of the trouble between himself and his son-in-law; that at this time the testator seemed mad and the witness did not think he was then capable of transacting any business. This witness stated that he did not think the testator was mentally right, and that when he was telling him about the son-in-law and the girl he was very much aroused and excited "and it looked to me like he had lost his reason."

Plaintiffs' witnesses on the issue of testamentary incapacity testified substantially as follows:

Mrs. W. J. Smith, an acquaintance of the testator, met him on the train going to Mexico, one day in June, 1914. After carrying on a conversation for sometime testator arrived at his destination, and when he got up to leave touched the witness on the shoulder and said, "Yes, but keep your mouth shut; I know something I can't even tell you; I am losing my mind."

W. J. Buchanan, cashier of the Bank of Eolia, testified that testator was director in that bank until July 7, 1914, and was closely associated with the witness in business. That "he noticed a change in testator in the spring of 1914, which gradually grew worse until he resigned as director on the above date. At the time testator resigned as director he stated that his mind 'was failing him.' " Testator tried to tell the witness his family troubles, but the witness made excuses and avoided it. Without any proper objection being made, this witness was permitted to testify that in the summer of 1914 he thought testator did not possess sufficient mind to comprehend his property and his family relations or to transact business. On cross-examination, however, he said he thought the testator knew his kin-folks, knew what property he had, and that he knew he was making a will.

J. E. Tucker, merchant at Eolia and president of the Bank of Eolia, testified that "prior to 1914 testator took great interest in the bank's affairs, but that in the spring of 1914 he began to lose interest, and that at the time the testator resigned he made a speech to the board of directors; that his speech was in a way disconnected; that he mentioned several little incidents and then repeated them during the course of his talk;" that "he talked childish and not like the Mr. Wigginton I had known." This witness thought there had been a great change in testator's mind, and at the time he resigned "the board of directors remarked he was off."

David B. Bibb, director of the Bank of Eolia, testified that in 1914 testator's mind was not as good as it had been; that he seemed quite feeble and that when the witness looked at him "it impressed me that his mind was weak." The witness on cross-examination stated that he thought testator knew what property he owned, but that in talking he would make a statement, and then within a short time repeat the same over again, and that when he resigned from the directorship of the bank he stated that he realized he was getting old, and that his mind was getting in such shape that he did not feel that he was capable of passing on business any more. This witness stated that he did not think testator was competent to transact business of any kind.

Marcellus Henry, one of the directors of the Bank of Eolia, testified that prior to 1914 testator was a good business man, but that in 1914 he thought from his actions that his mind was growing weaker. He said, however, that it "might be" that testator understood ordinary business affairs.

Judge J. W. McIlroy, ex-county judge, lived on a farm just across the road from testator's home during the last fourteen years of his life. In the spring of 1914, witness states, testator looked haggard and troubled, and said that he was in great trouble, but did not state what the trouble was. The testator frequently came to witness's house and sat in the shade and talked and one day said: "I am in much trouble. I believe there is an

Wigginton v. Rule.

intimacy between Ed. Goodman and Bertha." Testator then told him about his suspicions and what he had observed, and that he did not think the son-in-law should leave his shoes down in the living room where the girl slept. Testator told the witness that he never saw anything wrong and never heard anybody else say there was anything wrong. The witness told testator that he did not think there was anything wrong, but was unable to convince the testator. The testator would continue to say, "Ed Goodman had no business leaving his shoes down in that room." The witness stated that at the time the testator would mention this subject he was all wrought up and excited, and that he would tell the same thing over and over again; that witness would ask testator to quit worrying about the matter and the testator would say, "Yes, I am going to quit it. I ain't going to think about it any more." That the testator would then cheer up for a while and would talk about different things, and probably in less than an hour he would come back on the same thing, saying: "Ed. Goodman had no business leaving his shoes down in that room." Testator told the witness that he had ordered his son-in-law and granddaughter to move from the place, and that shortly thereafter he had changed his mind and apologized to them and told them they need not leave. Testator's conversation concerning the son-in-law and girl continued from the spring of 1914 until his death. Testator told the witness about knocking the door in with the maul—testator saying "he heard talking and he couldn't sleep and it worried him and he suspicioned that Ed Goodman was in there with the girl," and he said "he knew if he went to unlock the door or get in there they would get away, and he went out to the wood house and got a post maul and he came back and he smashed the door in and he went in and the girl was scared and she was in bed by herself, and Mary and her beau were in the parlor, and it scared them and he [testator] said, 'Where is Ed Goodman?' and about that time Ed Goodman appeared at the head of the stairs and said, 'What's going on?' and testator said, 'Then

I went back to my room.' ” On one occasion testator asked the witness for advice concerning the disposition of his property and the witness told him that he was “not in any condition to convey property and it won’t stand in law.” The testator replied that he wanted to dispose of his property “so that Ed. Goodman could never get a cent of it.” The witness told testator that he was doing wrong, and advised him not to give Bob Beasley the four-hundred-acre farm, and told him not to give him over one-fourth of it. The testator also said that he was going to entail the property he gave to Mary, so she could not sell it or that they could not take it for her debts and that Mary’s children couldn’t sell it until the youngest was twenty-one years old; that the testator agreed with him apparently, but that he could see by his countenance that he told him the wrong thing, and that testator never after that time asked him for advice about the disposition of his property, but that he would frequently come over and go over his old story about Ed. Goodman.

One day the testator came over to witness’s house and said, “I want you to fix up and take me to Jacksonville to the asylum,” and witness said, “Why, Mr. Wigginton, why do you want to go to the asylum?” and testator replied, “I can’t stay at home, I fell out with those folks, I can’t stay here and I had gone to Louisiana, and stayed there and I can’t stay there, this trouble is the sole cause of it, and I went out to Excelsior Springs and I tried to stay there and I couldn’t,” and he said that “something has got to be done, I can’t stand this trouble,” and the witness replied, “Mr. Wigginton, you are not crazy.” At another time he told the witness he was “sick in body and mind,” that his mind was so bothered that something had to be done or he could not live.

This witness stated that basing his opinion upon the conversation of the testator and his acts during July and August, 1914, he did not regard the testator as having a sound mind at that time.

Wigginton v. Rule.

Upon cross-examination he stated that testator had lucid moments when he was apparently sane, but that when he would get to talking over these family matters and talking about the disposition of his land and about Ed. Goodman, he became excited, and "then he would get off;" "his motive was to keep Ed. Goodman from handling any of his property." This witness further testified that he thought testator knew his property and his kin-folks, but that he did not think he was capable of making a will, and that he had allowed himself from imagination to think wrong about his son-in-law, and that he was carrying it out in making disposition of his property. Further on cross-examination the witness testified that his reason for telling the testator that he was mistaken about his suspicions concerning the son-in-law and the girl was "that he had known the girl under all conditions and I never saw anything wrong with her. I thought he [testator] did not know what he was talking about. I thought it was all imagination of a diseased brain, I thought then he was off and I think so yet." That on one occasion the testator said, "I want you to take me to Jacksonville to the asylum; I believe I am losing my mind." This witness further testified that he was a director in the Mercantile Bank of which Mr. Rule (the executor) is cashier.

Dr. J. M. Duncam testified that he had known testator for twenty years, and had treated him in a professional way the last fourteen years and so treated him in 1914; that the testator was suffering from insomnia, was very nervous and did not have much appetite. That the testator told the witness about some trouble between the girl Bertha and a negro boy, who also worked on the place, and that when talking about it he would flush up and become excited. The witness stated that at that time he did not think that testator was insane, but that he was not like he was when he was "strong-minded;" that the testator came to him in June and July and that his condition was "tolerable," but the witness did not hardly think him competent to attend to his business affairs. On cross-examination he testified

he thought testator had sufficient mind to know his property and children, etc., and that he thought he was capable of transacting ordinary business, but that he did not think he was able to appreciate the value of his farms and that he was not able to transact "extraordinary business."

Paul Cash testified that he had known testator fourteen years and in the summer of 1914 saw testator sitting in a buggy out at the side of the road where the buggy had stopped; that the hitch rein was dragging on the ground and that testator was talking to himself; that he got up within five feet of testator and spoke to him, but the testator never looked up; that he was unable to arouse him after speaking to him three times, and that the testator did not recognize him.

Dr. I. H. Miller testified that he had known testator for eighteen years, and had treated him professionally for eight or ten years prior to 1914, and had treated him in May and June in 1914. This witness said that having known testator as many years as he had he concluded early in 1914 that the testator's mind was very much impaired; that the name of his trouble was arterio-sclerosis of the blood vessels supplying the brain; that he was suffering with insomnia and vertigo and ringing of the ears and melancholy. He discussed with the doctor his suspicions about his son-in-law. The witness thought the testator was not capable of transacting business. On cross-examination the witness said that he tried to keep the testator from talking along the line "that he would get off on;" that the hardening of the arteries of the brain decreased the regular circulation through the brain and it had an effect on his mind, and that the hardening of the blood vessels of the brain had the effect to produce melancholy. This witness further testified on cross-examination that the testator did not talk intelligently "when he was going on about his son-in-law," and that the testator was "so agitated over it." The witness further testified that it was not so much the testator's talk as it was his demeanor that indicated insanity.

Dr. J. W. Crewdson testified that he had known testator for twenty-eight years; that he had treated him three times professionally in the summer of 1914; that testator told him of his trouble with his son-in-law and told him that his (testator's) mind was failing. From the witness's personal knowledge and observation he formed the opinion that the testator was incompetent to transact business "of any character involving any moment." Upon cross-examination the witness testified that testator was not capable of transacting anything that "would be dignified by the word business," and that if he sold hogs correctly it was merely an accident; that testator told him his mind was bothering him and that he was not in his right mind and that he had worried over his son-in-law's conduct with the girl; that his conversation was incoherent and disconnected and that he did not stick "lucidly" to any one subject; that the testator was not sane and that he was not of sound mind; that he did not intelligently describe symptoms, but only in a disconnected way; that the testator complained of "vertigo and dizziness and had loss of memory, hallucinations and inability to recollect." On redirect examination the witness further testified that testator had the body of a man, but the mind of a child, and that he could not intelligently grasp any situation, and that he did not think that he had sufficient mind to appreciate the farms he had and their value as any intelligent man would.

Mrs. Lou Stark testified that she was well acquainted with the testator and frequently talked with him during the summer of 1914. The witness worked in the office of Dr. Miller. Testator occasionally came to that office for treatment, and would converse with the witness; he told her that he was in poor health, nervous and unstrung and did not know what he was doing, and that it was terrible to be in that state of health; he said troubles at home were worrying him; one day he came in the doctor's office, and the doctor was out and he stated to the witness: "I must have a talk with someone." She told him that he could talk to her. He then said that he

Wigginton v. Rule.

was in very great trouble with his family, and told of his family affairs in a very excited manner and seemed unusually nervous; stated that he had trouble with his son-in-law over a young girl he had taken to raise—that he thought the son-in-law too attentive to this young girl—that he (testator) loved the girl, and he did not care who knew it, and he did not want her mistreated; testator would then jump off of that subject on to something else, and spoke about making a will and said that he had promised all of his friends that he was going to give them some of his money, and that Ed. Rule had talked him out of that and had advised him what to do; he further stated that he did not have long to live, that he was a mental and physical wreck. He got up and walked over towards a table and after hammering on the table caught hold of witness's arm in an excited manner and said: "I don't know what to do, I don't know what I am going to do; I don't know what is the matter with me," then he turned around and took a few steps and again began telling about his troubles saying "that he had always promised that he would give his farm to his daughter Addie for her and her husband, and he had not done it, and that he had sold his farm, and that he did not know what to do about it."

Witness asked him if he believed those things he was saying about his son-in-law and testator said: "No, I don't know it to be true, but I don't know what to do. I don't know what to do. I have got no home now. Ed. and his wife have offered me a home with them, and I don't know what about the money, I don't know what about the money. Bud Jones told me I could fix me a room up there and live there and it would not cost me a cent." Witness stated to him that it was so unlike him to talk about his troubles, and testator replied: "I know won't anybody around Dover believe me, they will believe Ed. Goodman because he is a good neighbor; they will believe him, they won't believe me."

On another day about August 1, 1914, testator again called at the office, and told the witness that he did not have any home and that he did not know what to do,

Wigginton v. Rule.

and asked the witness if she would take care of him the rest of his life if he would give her sufficient money or would give her the money he had. Witness told him he was not capable of making any proposition like that, and that his money belonged to him and the children and she refused to consider it. At this time the testator was excited, walking about the room; his voice was husky and the witness saw him wipe his eyes. She states that he cried, but that she did not see any tears. Witness gave it as her opinion that he was insane and unbalanced and did not think he was "competent."

On cross-examination witness stated that she had known testator for thirty years, and that she did not think he knew how to attend to business the last time he was in the office; that his conversation was disconnected from beginning to end; that he used the word "damn" which was unusual for testator; that he was "damning" his son-in-law for interfering, and stated that he was not going to give him any of his money. The witness was asked the question if she thought he was crazy because the testator did not want to turn his money over to his son-in-law, the answer was as follows: "Yes, sir. If you heard as many different things said about any one man as Uncle Cal was in the habit of saying about Ed. Goodman in the years gone by you would think there was something seriously wrong."

J. C. Johnson, who married a niece of the testator, testified that he saw testator often in 1914 and that his farm was near the farm which the testator gave to Bob Beasley; testator told witness about his son-in-law and the girl, and the witness told him that he might be mistaken; testator said he could not be mistaken, and kept bringing up the subject about the girl and the son-in-law; prior to that time he had always spoken very kindly concerning the son-in-law. The witness was of the opinion that testator did not have sufficient mind to comprehend business transactions and realize his relations to his own family.

Upon cross-examination this witness admitted that he rented wheat ground from testator after the above

conversations, and bought seed wheat from him in July; testator said that he thought about as much of Beasley as he did about his own children and that he had given Beasley the old home place, and that he had first made a will giving practically everything to his granddaughter Mary, but that since his trouble with the son-in-law concerning the girl he thought if Mary died before she married or did not have any children his son-in-law would get everything he had and he wanted to change it, and said that he was going to leave Addie and also Ed. some.

James E. Pew, one of the attorneys of record for the proponents, was called as a witness by the plaintiffs. He testified that in April, 1914, testator had him prepare a notice for Ed. Goodman to vacate the farm; that the testator also asked him to write a will; that the testator at that time had an intense feeling toward Goodman on account of his suspicions concerning the girl. The witness discouraged testator in his desire to make a will, and said to him, "I won't write a will for you today, I don't think a man in your condition should write a will at this time, or in your condition; I said, you are exercised, you are out of humor with your son-in-law, and you are telling me about this girl down there, and in the general condition your mind is in today I don't think a man should make a will, and when he does I think he should be in peace with his family and friends when he makes a will, and for that reason Cal I won't write a will for you." The witness further said: "My further reason for not writing that will was another personal reason; it was a family matter, and he had described how he disliked Goodman on account of his treatment to this girl, and I thought all of them being in the family it would be better that I, as a lawyer, would advise him not to write it at that time. Those were my reasons." On cross-examination the witness said that he did not refuse to write the will because the testator was crazy, but because he thought testator was in a bad humor with the members of his family. He also stated on cross-examination that in his opinion testator knew his property, its value and his children and relatives.

Wigginton v. Rule.

Len Butts testified that he saw testator at a funeral in the summer of 1914, saw him leave the crowd and go out by himself and sit in a buggy where he sat looking down at the dashboard and talking to himself; that his acts were not natural, and that he was in deep thought about something and seemed "all to pieces."

Jeff Estes testified that testator told him that his mind was getting off and that he could not remember things; that at one time testator wrote him a letter about selling him a farm, and when the witness called to see him about it testator did not remember anything about the letter; that in his opinion testator did not have the mental capacity to understand business transactions and to realize his relations to the members of his family. On cross-examination he stated that the testator knew his property and kinfolks.

Herbert Farrell testified that while Sam Brown was running a threshing machine in the neighborhood the testator had been out to the machine two or three prior times, but later came out to where the machine was working and said "he hadn't seen Sam Brown thresh a bundle of wheat since he started out." The witness had seen him at the other places, and from the above remark thought he was crazy, and he also gave it as his opinion that the testator did not have sufficient mind to transact business and to realize his obligations to the members of his family.

Frank Estes testified that in February, 1914, some men were at work removing a snow drift in the road and that he met testator in the road and testator asked him if he thought "they would let him see it" (the snow drift); on June 4, 1914, he saw testator at the breakfast table in a hotel in Louisiana and testator asked witness where he had been. Witness told him he had been to St. Louis to sell stock, and in three or four minutes testator asked him the same questions over; two weeks later testator did not recognize witness at his home; witness went to testator's home to deliver mail to a young lady visiting them. Testator said he did not know anybody was visiting

them. (It appears from other evidence in the case that testator had assisted the granddaughter and visiting girl in hitching up a horse on this same morning.)

In the latter part of June, 1914, witness met testator on the road and testator said to him, "I see you on the road often, but I don't know you." On August 4, at Clarksville, testator shook hands with witness and asked him who he was; the witness had lived near him since 1901 and had seen him frequently during that time.

The witness stated upon cross-examination that he might be capable of telling who his children were and of what property he owned, but he did not think testator had mind enough to comprehend the value of his property.

J. M. Givens, who had known testator for more than forty years, stated that he had a conversation with testator at the hotel in Louisiana during the summer of 1914; testator told him of his suspicions concerning the son-in-law and the girl; told him about breaking the door down with the maul. The witness stated that testator "was all to pieces," and that he did not think he was competent to attend to business; the witness tried to reason with testator concerning his belief about the son-in-law, but was unable to change testator's mind.

Witness further states that he did not think testator was mentally competent to make a will at that time; that they would be having a conversation in front of the hotel and testator would ask him a question and tell him something, and then in less than ten minutes he would tell the same thing over or ask the same question again. Witness stated that he thought testator knew what property he had, but he doubted if he knew its value, and he doubted very much if testator had mind enough to retain matters in his mind long enough to make a will.

Upon cross-examination the witness testified as follows: "He had brooded over these things we just spoke about awhile ago and he became partially unbalanced from them, not crazy, I wouldn't say Cal Wigginton was crazy, but a man can brood over things, one thing, until he becomes partially unbalanced." At one time testator said to witness, "I am just all to pieces."

Wigginton v. Rule.

C. C. Tague testified that testator told him of his suspicions about his son-in-law and the girl, and that he objected to his son-in-law leaving his shoes in the room where the girl slept, especially in the summer time; testator said he never saw anything, but only had suspicions; witness tried to reason with testator, but testator said "there ain't no doubt, there ain't no doubt." The witness thought testator's "whole mind was on Goodman and the girl."

On cross-examination witness said, "I don't think he [testator] was competent to know them [his children] when I saw him the last time; when a man is raving, aquoting Scriptures, and standing in his buggy and making speeches he ain't fit to do business or nothing." Witness further said: "No, sir, I judge from his (testator's) eyes, the look in his eyes, and on the other hand his talk and abuse, that he was not competent to do business with nobody."

The witness stated that he thought testator was wrong in his belief about his son-in-law and said: "He did not give me any reason for not being wrong."

Wm. B. Haley testified that he had known testator for fifteen years and at the time the will was made was assistant cashier of the Merchants Bank of Louisiana, and also wrote fire insurance and had written testator's fire insurance; that he was well acquainted with and was on friendly terms with the testator; that some time in the summer of 1914 testator came to the bank and asked to see the witness in the directors' room; they went into the directors' room, and there the testator started to read a letter but broke down crying, and could not finish reading the letter. He then handed the letter to the witness; the letter was from some town in Illinois, and the witness thought it was signed by a lady whose first name was Bertha.

From the witness's memory he testified the letter contained the following: "Dear Mr. Wigginton, I have found a piece of property over here that I would like to own and it can be brought for three thousand dollars, and [either] please send me the money" or "I am sure you

will send the money when you know I want it." Testator told witness that the writer of the letter was a girl who had been living at Ed. Goodman's, and he stated to the witness that he wanted to borrow three thousand dollars and send it to her. He further said: "The girl is the sweetest and nicest girl that I have ever known; she has taken more interest in me than anybody." Testator stated that he would give a deed of trust on the Griffith farm to secure the loan. The witness tried to make the loan, but could not do so, and testator was very much exasperated a few days later when witness told him he had not been able to get the loan. Later testator told witness that he was going to sell the farm and get the money and that the witness need not try to borrow the money for him.

Testator told witness that he had made him executor in his will, but did not say anything about making Rule co-executor. Testator told the witness some complimentary remarks that he had heard about him, and appeared to be very friendly with him. The testator said he thought Goodman was in love with Bertha Howell, and that he did not like it "a little bit." He told the witness that one morning he heard a noise in the girl's room and went in and saw Ed. Goodman in there and asked him what he was doing and Goodman said he was building a fire.

Testator said he was so worried about this girl affair down on the farm that he could not sleep, and that he could not stand it any longer.

At another time the witness accused testator of being in love with the girl, and the testator said: "You seem to understand me." The witness advised testator to marry the girl. Testator said he was too old to marry anybody, and furthermore he had promised either his wife or sisters that he would never marry, and said: "I have gone on my knees and talked to my God on several occasions about breaking my word and I have never got any satisfaction out of the Lord about breaking my word and I have not broken my word to get married." He further stated that if he would marry that "would beat

Ed's time." Witness stated that during the latter part of the summer of 1914 he did not think the testator had mind sufficient to know the value of his property and appreciate his relations to his family.

The testator later told the witness that he had changed his will, but he never told him that he had changed executors.

Mrs. Cora E. Ogden testified that she had known testator all of her life; that she had a home in Pike County, and that in the summer of 1914 she accompanied her married daughter to the train. Testator asked the witness if she was going to Illinois to make her home with her daughter, and said that it would be a nice thing for her to do. Witness thought the testator's question a strange one since she had a home and husband in Pike County. She thought testator's mind was weak when she talked to him and that in the last of June, 1914, his eyes "looked very glassy" and he did not "seem as he always seemed."

Ed. Ogden who had known testator all of his life stated that he met testator on the street one day, and testator said that he wanted to see him on business and asked him where he could find him in ten minutes. The appointment was arranged, and witness went to the appointed place. Later testator came in, sat down, picked up a paper and began reading. The witness sat around for a half an hour. The testator did not say anything further and the witness left.

On August, 1914, while at Sunday school testator said to the witness, "Ed, do you think that Eureka Springs water would sprout hair on your head?" The witness further testified, "It made me kinda look and think" (upon cross-examination the witness stated that he did not think that testator was joking), and further stated that the testator was not looking good that day; "that he put his book up before his face in the Sunday school class:" that "they all thought he was looking at the Sunday school lesson and I could see he was not, he was muttering and sometimes he would make a noise and sometimes he would not. His lips was moving and finally

he dropped over to sleep." "His eyes looked kinda funny while the preaching was going on."

He further testified that "lots of times" in the summer of 1914 testator did not have mind enough to appreciate the relations to his family or know the value of his property.

C. A. Patterson, 85 years old, uncle of Ed. Goodman, testified that in the summer of 1914 testator said to him: "I appointed myself a guardian, and have turned them over all my papers a few days ago." This witness also said that in the summer of 1914 he saw testator on the street and said to him: "I came down here to have a special talk with you today; several people from the neighborhood down there said you were crazy." Testator told witness that he was then in a hurry, and made an appointment to see him later, but instead of keeping the appointment left town. Witness did not think the testator was competent to attend to business.

Mary O. Goodman, granddaughter of testator, twenty-two years old, testified that Bertha Howell was brought to the Goodman home about three or four years before the trial; that she was sixteen years old at the time of the trial (the trial occurred February 11, 1915); that she and Bertha slept together during the last two years and kept their things in the same room; that they both did housekeeping and went together to Sunday school; that her grandfather accused her father of being intimate with the girl, and that she told him that he was wrong and that he said, "No, indeed," and shook his fist in witness's face; witness talked to him every week about it, but was not able to reason with him. The witness then relates the incident when the testator broke the door down with the post maul, and in this corroborated the statement heretofore made; the witness stated that she was unable to persuade the testator out of his thought about her father and the girl, but when he talked about it he became all excited and would get up and walk around and sometimes would swear; that sometimes he would seem all right for a little while, and then he would begin talking about her father and this girl; that

Wigginton v. Rule.

her father tried to reason with him, but it did not have any effect; that prior to this trouble her grandfather treated her father all right, and said there was not a better living man; that he changed his attitude toward her father in the spring of 1914; she further testified that she did not think her grandfather was capable of transacting ordinary business or understanding his relations to his children in the summer of 1914. On cross-examination she testified that she had asked her grandfather to buy back the farm from Doug Burns; and that outside of the one subject about Bertha and her father her grandfather talked rational. Several post cards which the testator had written the witness were read in evidence. The post cards were as follows:

“Clarksville, Aug. 26, 1917.

“Miss Mary Goodman, Eolia, Mo.,

“Dear baby love will try and drop you a few lines to let you know that I could not stay at the Springs Mary forgive if you can your poor old miserable old granddad Oh how I regret haveing treated my baby as I have I think I will go to Boles tomorrow but go with a sad heart for haveing treated my only dear baby as I have good by little darling forgive oh forgive if you can from your poor miserable old grandpa.

“Clarksville, Aug. 26.

“Mary Goodman.

“My own and only dear baby you dear little darling oh how I have suffered I don't see how I could treat you as I have oh you dearest being on earth to me if your dad had not talked so rough to me I would not have done as I did good by you dear little darling forgive if you can.

“Eureka Springs Ark.

“Miss Mary Goodman

“Dear little darling, pray for and forgive me for what I have done and for what I am about to do I don't want to live any longer if Ed had not kussed and abussed me things would have been different oh you dont know

what I have suffered can write no more good by forever your in love.

“C. W.

St. Louis, Aug.

“Oh you darling baby you will forgive me and love me still no one knows how I have suffered pray for me and forgive the last act of my life I wish I could but I cannot I would like to see you once more to hear you say you forgive oh you little sweet darling.

“Good by remember in love and kindness I am so sorry I sold your home I did not think I was so worried good by.”

Another post card addressed to this witness and found in the pocket of testator after he had committed suicide read as follows: “I do this to keep out of the asylum as I feel I will have to go good by to all the world.”

Bertha Howell testified that she had lived at the Goodman home for three years and that she was sixteen years old; that Ed. Goodman treated her just like a father, and had never made any improper remarks to her and had never attempted any improper act towards her; that on one occasion a little girl was visiting the Goodman home and she sent the little girl with a note to a neighbor; that when the little girl returned the note it was the same one she had sent, and that she sent the little girl back for the answer. Mr. Goodman was not with her in the house at that time. She thought he was out on the front porch.

Witness also relates the incident of testator knocking down the door with an iron maul; that at this time Mr. Goodman called from upstairs asking what was the matter. She also stated that Mr. Goodman had not been alone with her in that room that night; that the room that she occupied was used as a sitting room for the family; that Mr. Goodman had always left his shoes there when he retired and would always make the fire in the morning. The witness argued with the testator that he was mistaken, but that it would do no good; that he seemed excited and awfully nervous; that one time testator told

Wigginton v. Rule.

her that after the time for making fires was over I think Mr. Goodman would quit leaving his shoes in the room; that one or two nights during the year when Mary was away from home she slept by herself in this room; that she said to testator, "Grandfather, you are mistaken," and that he replied, "I hope to God I am," and commenced crying.

Testator told witness he did not believe he could live on the farm without her; the witness, however, decided to leave the Goodman home, stating that it was testator's home and that she thought she should leave; she left in July and went to Mexico for a week, and testator wrote her a letter every day and on one day wrote her two letters; that testator also came to Mexico and gave her fifty dollars with which to buy clothes; that later in Louisiana testator asked witness if she would forgive him for what he had said about her saying that he was crazy and did not know what he was saying. The witness returned from Mexico again to the Goodman home, remaining about a week and then left, thinking that perhaps if she would leave testator would come back to his home. Witness denied that she had written him asking for three thousand dollars.

Ed. Goodman the son-in-law testified that he never treated Bertha Howell in any other way than as a father would treat his daughter, and that nothing out of the way had ever occurred between them; that it was his habit to build the fires in the morning, and one day when his daughter was away he noticed the testator watching him; that he tried to persuade the testator there was nothing wrong, but could not do anything with him. Later the testator said he could not stay there if the girl was to stay, and the witness then told him they were thinking of finding another home for the girl; at one time testator told witness that he (testator) was crazy; that at one time the testator in abusing him about the conduct of the girl threatened to disinherit his daughter, and the witness said to him, "You can do as you damn please with your property," and another time he also told the testa-

tor that he was telling a "damned lie" about himself and this girl; the testator served notice on the witness to vacate the property, and later he withdrew the notice and apologized. The witness said that he did not think the testator realized what he was doing. On cross-examination the witness said that the testator had given his wife sixty-five acres of land in the year 1893; he also said that he thought testator knew his property and the natural objects of his bounty, and that he thought he would know what was in the will.

Ed. B. Wigginton, 53 years of age, son of testator and one of plaintiffs herein, testified that on July 2, 1914, his father first told him about his troubles with Goodman; that his father at that time had a different expression on his face, a different look on his face to what he had been accustomed to seeing, and when he began "to tell me about his trouble he become excited and agitated" and, "I don't believe he cried at that time, but he was very agitated, excited and worked up about it;" that on July 6th his father mentioned the subject again, and cried when he was talking, and told him about the incident when Bertha sent the little girl away with the note, and also of the time he broke the door down; that about the first of August he went over the story again and at that time he was very weak, feeble and tottering in his walk. Witness also stated that on July 2, 1914, testator made him a deed to the farm near Clarksville, and that he was also present part of the time when testator made his will of August 8th, but that he was not present when the will was signed; that he took his father to Eureka Springs on August 9th; that while on their way and when they had arrived at Seligman testator broke down and began crying and said that he could not go any farther, that he had to go back, that he felt like throwing himself under the car wheels. Witness stayed a week with him at Eureka, and then left him there in the care of other people. About a week later testator returned to his son's home at Clarksville.

Witness stated that he did not think his father was rational during the summer of 1914, and that he did not

Wigginton v. Rule.

think his father comprehended the transaction when he deeded him the 130-acre farm near Clarksville and assigned to him the bank stock; that he thought testator was then insane; that testator never mentioned his insane daughter's name in the summer of 1914.

When asked upon cross-examination why he did not refuse to receive the deed to the farm he stated that he did not refuse the deed because he knew if he got it "somebody else wouldn't." He further testified that on August 1, 1914, testator did not act like he knew what he was doing, but seemed dazed (this was the day he delivered the deed to the witness). While testator was at the Springs he wrote his son the following letter:—

Mr. E. B. Wigginton

"Dear son if anything happens to me I wish you and Bobb would help to pay my funeral expense and toombs stone as it will be hard on Mary to pay it all I dont want a large and expensive stone as I dont deserve it you people be very kind to Mary I feel that I have done her badly dear little baby darling my own and only grandchild. pittty oh pittty me oh how I have suffered remember me in kindness farewell pittty oh pittty me."

In rebuttal the proponents offered testimony tending to show that testator was suffering with a cataract during the summer of 1914, which accounted for his inability to recognize people whom he had formerly known.

I. We are unable to agree with appellants' contention that the court erred in refusing their peremptory instruction. We have painstakingly set forth in the foregoing statement the facts bearing on the issue of testamentary incapacity. It would be but a repetition and therefore useless to reiterate the same here. The whole evidence carefully considered, we have reached the conclusion that it was sufficient to authorize the submission of the issue of *devisavit vel non* to the jury.

The facts presented by the record in the case at bar are even stronger than those held in judgment in the recent case of *Thomas v. Thomas*, 186 S. W. 993

(not yet officially reported), wherein it was held by Court in Banc that the evidence of testamentary incapacity was sufficient to go to the jury.

II. It is further contended that the court erred in instructing the jury on the question of an insane delusion. Respondent's instructions numbered 2 and 3 on this issue were as follows:

"2. The court instructs the jury, that if you believe from the evidence in this case, that at the time Calvin Wigginton signed the paper read in evidence, purporting to be his last will and testament, he was possessed of a false and mistaken conception and belief of an unduly intimate relationship existing between one Ed. Goodman, his son-in-law, and a young girl, an inmate of the said Goodman's home, and was also laboring under such false and mistaken conception and belief, if the jury so find, of such intimate relationship, at the time he executed said instrument of writing, and if you find that there was no evidence of any such intimacy, and no foundation in reality, for any such conception or belief, but that such conception and belief was false, and said Wigginton could not be reasoned out of it, and was incapable of divesting himself of such conception and belief, but acted on it in executing said instrument of writing, as being true; and that this false conception and belief, if the jury so find, solely determined the disposition of his property, contained in said instrument, then the jury will find that said instrument of writing is not the last will and testament of said Calvin Wigginton.

"3. The court instructs the jury, that an insane delusion, as referred to in other instructions, is a conception originating spontaneously in the mind, without evidence of any kind to support it, which can be accounted for in no other reasonable hypotheses, having no foundation in reality and springing from disease or a morbid condition of the mind, and the person laboring under the same cannot be reasoned out of such conception; that, whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is

Wigginton v. Rule.

incapable of being reasoned out of his false belief, he is in that respect insane.

"And if the jury believes from the evidence that the instrument of writing, read in evidence, signed by Calvin Wigginton, was the fruit or off-spring of such delusion or false conception and that said Wigginton could not be reasoned out of said delusion, if any, then they should find that said instrument of writing is not the will of Calvin Wigginton, and this is true, although they may believe that said Wigginton was sane and rational upon other subjects, and capable of transacting ordinary business."

As we understand appellants' position as outlined in their brief they raise no question as to the form of the instruction, but contend that there was no evidence of an insane delusion upon which to base the instruction.

The appellants (proponents) asked the following instruction:

"The court instructs the jury that even though you find and believe from the evidence in the cause, that Calvin Wigginton was laboring under a delusion, in respect to the relations between his son-in-law, Ed. Goodman, and Bertha Howell, and that he was unable to rid himself of such delusion, still you cannot find against the will, merely because of such delusion and his inability to rid his mind of it."

The court gave appellants' above instruction after properly adding the following clause, to-wit: "provided such delusion, if any, did not govern or control his mind at the time of execution of the instrument of writing read in evidence as the last will of said Wigginton, as defined by other instructions in the case."

Appellants' instruction numbered 6 also instructed the jury what to do in the event they should "find and believe from the evidence in the cause that Calvin Wigginton was insane and was laboring under delusions both before and after the date of the execution of the paper writing purporting to be his will."

It appears from the foregoing that even the appellants' instructions submitted the case on the theory that

there was evidence tending to show that testator was possessed of an insane delusion concerning the son-in-law and the girl. Respondents insist that it is a sufficient answer to appellants' present position to say that the case here should be reviewed upon the same theory upon which it was tried by appellants below. But putting aside this reason, which if applied to the present situation might appear to be somewhat strained, we will state we think there was sufficient evidence to make the question of an insane delusion one for the jury.

In the case of *Knapp v. Trust Co.*, 199 Mo. 640, l. c. 667, GANTT, J., speaking for the court, quoted with approval the following definitions of an insane delusion, viz: "Whenever the person conceives something extravagant to exist, which has in fact no existence whatever, and he is incapable of being reasoned out of this false belief, it constitutes insanity" and "whenever it appears that the will is the direct offspring of the partial insanity or monomania under which the testator was laboring, it should be regarded as invalid, though his general capacity be unimpeached." And further, "An insane delusion has been variously defined to be a belief in something which no sane person would or could believe, something in the nature of things impossible, or which has no foundation in fact . . . An insane delusion is a belief induced by insanity. The error is simply a means of detecting it, and not always satisfactory at that." And further, "To invalidate a will it must appear that the testator was subject to a delusion as to the facts within his own observation, in the existence of which he actually believed, which a rational man, from the use of his senses, under the same circumstances would have known not to exist." [Id. l. c. 667-8.]

To the same general effect are the following authorities: *Benoist v. Murrin*, 58 Mo. 307; *Holton v. Cochran*, 208 Mo. 314; l. c. 404 and 418 et seq.; *Buford v. Gruber*, 223 Mo. 231, l. c. 248 et seq.

In the case of *Fulton v. Freeland*, 219 Mo. 494, l. c. 517, GRAVES, J., said: "There is no such thing as a delusion founded upon facts. It is a mental conception in the

Wigginton v. Rule.

absence of facts. If the idea entertained has for a basis *anything substantial* it is not a delusion." (Italics ours). The above is in full harmony with the cases above cited.

It is true in that case the following was quoted from a Nebraska case viz.: "No belief that has any *evidence* for its basis is in law an insane delusion." (Italics ours.)

But the word "evidence" in the foregoing definition has reference to the evidence which the testator may have had before him at the time he formed the belief. It cannot have reference to the evidence which may be offered upon the trial of the case, because if it did, the mere presence upon the trial of any testimony tending to show that testator had some evidence for such a belief, would, *ipso facto* and as a matter of law, determine that there was no insane delusion, and the jury, although there was a conflict of evidence upon that point, would be deprived of determining the real issue of fact, viz., did testator have before him evidence acting upon which any normal or rational mind would have formed such a belief? Whether a given testator did or did not have before him a sufficient evidentiary basis for such a belief is in many instances a question for the jury.

If appellants' theory be the correct one, the issue of mental delusion would in many instances be improperly taken away from the jury. We are unable to agree with appellant's contention in this regard.

The additional cases of *Conner v. Skaggs*, 213 Mo. l. c. 348, and *Sayre v. Trustees*, 192 Mo. l. c. 126, cited and relied upon by appellants are so different in their facts from the case now held in judgment as to be of little help as precedents in the instant case.

In the instant case there is testimony from which the jury would be justified in finding that testator was insane on the subject that an illicit intimacy existed between his son-in-law and the girl Bertha; some of the witnesses say he was "off" or "unbalanced" on this subject; that he did not talk intelligently or rationally about it; that there was no sufficient foundation for such a belief; that it was constantly on his mind during the summer of 1914; that his closest friends and life-long neighbors could not

reason him out of this belief; that it so worked on his mind as to cause him to write his will the way he did. (If the property had not been placed in trust as it was the son-in-law as guardian of the insane daughter and as father of the granddaughter would necessarily have had much to do with the control and management of the property).

Applying the rule announced in the above cases we think there was evidence sufficient to justify the jury in finding that testator was possessed of an insane delusion on the above subject and that it determined the disposition which he made of his property. This being true it follows that the court did not err in submitting that issue to the jury.

III. We find no error in the admission of the post-cards from testator to his granddaughter written by him a few days after the will was executed. They were competent evidence of his mental condition. Appellant contends that they were too remote. No hard-and-
Remote fast rule can be stated concerning the com-
Occurrence. petency of this character of evidence. In the case of *Story v. Story*, 188 Mo. 110, l. c. 127, LAMM, J., quoted the applicatory rule as follows: "No rule of competency can be stated, except the rather vague one that evidence of mental condition prior or subsequent to the making of the will must be sufficiently near in point of time to aid in determining the testator's condition at the time of making the will; and whether or not it is too remote is a question for the court to decide."

In the present case it does not appear that there was any noticeable change in testator's mental condition between the time he executed the will and the time he wrote the post-cards. Only a few days elapsed between the two dates. Under such circumstances we are unable to say that the evidence was too remote.

IV. It is further contended that the court erred in permitting lay witnesses, over appellants' objection and

exception, to invade the province of the jury by giving their opinions to the effect that testator did not have sufficient mind to know the value of his property, or to realize his relations toward his children, etc.

In the recent case of *Heinbach v. Heinbach*, 274 Mo. 301, the case now relied upon by appellants, FARIS, J., announced the rule, to which we still adhere, that a witness in a will-contest case should not be permitted to invade the province of the jury by expressing his opinion on the very question the jury is to determine, to-wit, the question of the mental capacity or incapacity of a person to make a will, as well as the several elements which go to make up such mental capacity, viz, "mental capacity to comprehend who his children were, to understand the nature and extent of his property, and to know to whom he desired to give it."

But we are of the opinion, for the reason given below, that the above rule cannot properly be applied in the present case.

Upon the oral argument we were of the opinion that the case would have to be reversed on account of this alleged error, but upon reading the voluminous record in the case we discover that all through the proponents' case in chief and upon the cross-examination of many of respondents' witnesses the proponents (appellants) themselves opened wide the door for the admission of this kind of evidence, and asked many of the witnesses the direct question as to whether or not in their opinion the testator "knew his children or kin-folks, or knew what property he owned, or knew who were the natural objects of his bounty." No objections seem to have been interposed by either side to this line of testimony for some time during the progress of the trial. After the trial had proceeded for some time and apparently after appellants had been able to produce about all of this kind of testimony which was favorable to them they seemed to have then come to the conclusion that such testimony invaded the province of the jury and interposed such an objection

to a part of similar testimony offered by the plaintiffs during the later portion of the trial.

After appellants by their conduct had invited this line of inquiry they should not now be heard to urge it as error. One of the fundamental rules governing trial conduct is that self-invited error cannot be made the basis of complaint. [Rourke v. Railroad, 221 Mo. 46, l. c. 62 and cases cited.] The application of this rule has most generally occurred in cases where the self-invited error came by way of instructions requested, yet no valid reason would appear to prevent its application to self-invited error in whatever form it may have appeared and we have no hesitancy in saying that it should be applied to the situation now held in judgment.

V. It is further contended that the court erred in refusing to give appellants instructions number 4 and 5. Instruction 4 is as follows:

“The court instructs the jury that if Calvin Wigginton had died without a will, or the paper writing in controversy be held not to be his will, then in neither event would Mary O. Goodman, his granddaughter, inherit any interest in his estate.”

Instruction No. 5, is as follows:

“The court instructs the jury that under the evidence in the cause, you will find that the paper writing in controversy, purporting to be the will of Calvin Wigginton, was executed in conformity with the provisions of the law relating to the execution of wills, and you will find that issue in favor of the proponents, that is, in favor of those seeking to uphold the will.”

Instruction 4 contains a correct statement of law, but we are unable to see wherein the legal information contained in this instruction could in any proper manner aid the jury in determining the issue of whether or not the testator had sufficient mental capacity to make a will. We hold therefore that its refusal was not error.

Neither did the court err in refusing instruction 5. There was no controversy about the "formal" execution of the will and there was no likelihood that the jury would go astray on that point. Furthermore the instruction in the form requested was likely to mislead the jury; in fact, we entertain some doubt ourselves as to just what thought appellants *may have intended* to convey by the phrase "was executed in conformity with the provisions of the law relating to the execution of wills." Strictly speaking it cannot accurately be said that a will executed by a person lacking testamentary capacity is "executed in conformity with the provisions of law relating to the execution of wills," this because the law requires the execution to be by one of sound mind.

The judgment is affirmed. All of the judges concur.

JOHN G. KUPFERLE FOUNDRY COMPANY, Appellant, v. ST. LOUIS MERCHANTS BRIDGE TERMINAL RAILWAY COMPANY.

Division Two, July 18, 1918.

1. **NEGLIGENCE: Obstruction of Street by Plaintiff.** The fact that the plaintiff maintained a naphtha tank in the street in violation of a city ordinance does not of itself prevent recovery by him for damages when the railroad company backed a freight car off the end of a switch track in the street, which passed on to and struck the tank, causing the naphtha to take fire and thus burning his factory in connection with which the naphtha was used. Unless the illegal obstruction was the proximate and efficient cause of the injury it does not totally bar recovery, nor relieve the railroad company for at least nominal damages for the negligent injury done to the tank.
2. ———: **Unforeseen Accident.** A party charged with negligence may be held liable for anything which, after the injury is complete, appears to be a natural or probable consequence of his negligent act. The fact that the trainmen, who backed the freight car off the end of a switch track and on to a tank ten feet beyond the end, did not know that it contained an explosive, does not protect the railroad company from damages caused by the explosion.

3. ———: **Contributory: Maintenance of Naphtha Tank.** Whether or not the plaintiff foundry company was guilty of negligence in maintaining a tank containing naphtha, which it used in connection with its factory, in the street, against which the trainmen shoved a freight car, after running it off the end of the switch track in the street, causing an explosion and a fire in the factory, and in covering it with a wooden box painted red, with no sign to indicate that naphtha was kept in it, is a question for the jury, and it cannot be said as a matter of law that the keeping of the tank in said manner and at said place was negligence *per se*.
4. ———: **Explosive: Violation of Ordinance.** The keeping of explosives in violation of a statute or ordinance is negligence.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

REVERSED AND REMANDED.

F. L. Cornwell, Barger & Hicks & Clyde Gary for appellant.

(1) Whether plaintiff was negligent in placing the tank of naphtha where the evidence showed it was at the time of the accident is under all the circumstances, a fact that, in the judgment of sensible men, would lead to different conclusions. Plaintiff was not negligent as a matter of law for any of the reasons hereinafter specified; therefore, the case should have been submitted to the jury under appropriate instructions. *Weber v. K. C. Cable Ry. Co.*, 100 Mo. 201; *Petty v. Hannibal & St. J. Ry. Co.*, 88 Mo. 316; *Huhn v. Mo. Pac. Ry. Co.*, 92 Mo. 450; *Mauerman v. Simerts*, 71 Mo. 105. (2) The tank of naphtha was not a nuisance *per se*, in that it was an unlawful obstruction on the public highway. *Robert v. Powell*, 168 N. Y. 411, 85 Am. St. 673, 55 L. R. A. 755; *People v. Park & O. Railroad Co.*, 76 Cal. 156; *City of Richmond v. Lambert*, 111 Va. 176, 28 L. R. A. (N. S.) 381; *Wolf v. District of Columbia*, 196 U. S. 156, 49 L. Ed. 428; *Nutter v. Pearl*, 71 N. H. 248; *Graves v. Shattuck*, 35 N. H. 265, 69 Am. Dec. 536; *Blackburn v. Southwest Mo. Railroad*, 180 Mo. App. 548; *Schopp v. City of St. Louis*, 117 Mo. 137; *Corby v. C., R. I. & P. Ry.*, 150 Mo. 466. (3) The tank was not a nuisance in that it was used for storing naphtha, a

Kupferle Co. v. Terminal Ry. Co.

volatile, inflammable substance. *O'Hara v. Nelson*, 71 N. J. Eq. 161; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Rudder v. Koopman*, 37 L. R. A. 489; *Kleebauer v. Western Fuse & Explosive Co.*, 60 L. R. A. 377, 94 Am. St. Rep. 62, 138 Cal. 497; *Barnes v. Zittlinger*, 25 Tex. App. 468; *Flynn v. Butler*, 189 Mass. 377; *Tuckashinsky v. Lehigh & W. Coal Co.*, 199 Pa. 515; *People v. Sands*, 1 Johns, 78, 3 Am. Dec. 296; *Dumesnil v. Du Pont Co.*, 18 B. Mon. 800, 68 Am. Dec. 750, 57 Ky. 800; *Wilson v. Phoenix Powder Manf. Co.*, 52 Am. St. 890, 40 W. Va. 413; *Remsberg v. Cement Co.*, 73 Kan. 66, 84 Pac. 548; *Harper v. Standard Oil Co.*, 78 Mo. App. 344; *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.*, 259 Mo. 254. (4) That plaintiff may have violated the law by placing the tank in the street does not preclude plaintiff from recovery for damages to its property in this case, unless such violation was a direct and contributory cause to the accident, which, under the evidence, was a question for the jury, under appropriate instructions. *Huelzenkamp v. Citizens Ry. Co.*, 37 Mo. 550; *Brown v. Hannibal & St. J. Railroad*, 50 Mo. 468; *Blackburn v. Southwest Mo. Railroad Co.*, 180 Mo. App. 548. (5) The proximate cause of the injury was the negligent manner in which defendant's employees shoved the car on the spur track. *Holwerson v. St. L. Sub. Ry. Co.*, 157 Mo. 231; *Railway Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 257; *Graney v. St. L., I. M. Ry.*, 140 Mo. 98; *Buckner v. Stockyards Horse & Mule Co.*, 221 Mo. 700; *Dean v. Railroad*, 199 Mo. 411; *Phillips v. St. Louis & San Francisco*, 211 Mo. 419; *Greer v. St. L., I. M. & S. Ry.* 173 Mo. App. 276; *Zeis v. St. Louis Brewing Assn.*, 205 Mo. 651; *Fishburn v. Railroad*, 127 Iowa, 492; *Woodson v. Metropolitan Ry. Co.*, 224 Mo. 685; *Strayer v. Quincy, O. & K. C. R. R.*, 170 Mo. App. 514; *Driskell v. United States Health & Accident Ins.*, 117 Mo. App. 362; *The Santa Rita*, 176 Fed. 895; *Insurance Co. v. Tweed*, 7 Wall, 44, 19 L. Ed. 65; *Washington & Georgetown R. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101. (6) Plaintiff had a right to rely on the presumption that defendant's employees would use ordinary care in shoving cars on this spur track. *Moberly v. K. C. St. J. and C., B. & Q. Ry.*, 17 Mo.

App. 543; O'Connor v. The Mo. Pac. Ry., 94 Mo. 157; Clark v. C. & A. Ry. Co., 127 Mo. 213.

T. M. Pierce, S. P. McChesney, and J. L. Howell for respondent.

(1) Under the law, the violation of the ordinance is negligence *per se*. Sluder v. Transit Co., 189 Mo. 129. And irrespective of any ordinance requirements, the placing of an obstruction in a public thoroughfare, whatever the character of the structure might be, and done without lawful authority, constitutes a nuisance at common law, and this becomes peculiarly a nuisance when the character of the obstruction creates an added danger to the public by reason of its dangerous nature. (2) The explosion and instantaneous firing of the naphtha in the tank, which the appellant had placed within a short distance of the end of the rails of the switch track, was the proximate and contributory cause of the conflagration which destroyed the property of the appellant, and therefore the appellant cannot recover in this case. 21 Am. & Eng. Ency. Law, p. 493, Note 1; 1 Thomp. Neg., sec. 83, p. 84; Anderson v. Miller, 96 Tenn. 35; Packet Co. v. Vandergrift, 34 Mo. 55; Callahan v. Warne, 40 Mo. 132; Concoran v. Railroad, 105 Mo. 399; Dougherty v. Railroad, 97 Mo. 647. If the accident be caused by the joint and concurrent negligence of both appellant's and respondent's agents, and the negligence of neither without the concurring negligence of the other would have caused the injury, the appellant is not entitled to recover. Hornstein v. Railroad, 97 Mo. App. 271; Webber v. K. C. Cable Ry. Co., 100 Mo. 194; Hogan v. Citizens Ry. Co., 150 Mo. 36; Moore v. K. C. F. S. & M. Ry. Co., 146 Mo. 572; Concoran v. St. L., I. M. & S., 105 Mo. 405.

ROY, C.—Plaintiff sued for damages caused by the alleged negligence of defendant in pushing a car off the end of a switch track against a car containing naphtha, demolishing the car and the box cover over it, causing the naphtha to take fire and thus burning plaintiff's factory and contents. The trial court sustained a demurrer to the evidence and plaintiff has appealed.

The fire occurred on the morning of September 7, 1912, about four o'clock. Plaintiff's factory building abutted on the south side of Wright Street between First and Hall Streets. Wright Street at that place was open and used, but it was not "made." It had no sidewalk.

The defendant had a switch track on Wright Street extending west a portion of the distance along the north side of plaintiff's factory. It was on a level with the street. Its south rail was forty-four inches from the factory, and there was no bumping post at the end of that track. Almost against its building and about ten feet west of the west end of said track, plaintiff kept a fifty-gallon iron tank containing naphtha, for the purposes of its factory. That tank was covered with a wooden box painted red. There was no sign to indicate that naphtha was kept there.

The evidence for the plaintiff indicates that defendant's employees negligently shoved a car along that track so as to run it off the end thereof against the tank, causing the fire.

In its answer the defendant alleged the existence of two ordinances of the city, one of which prohibited obstructions in the street, and the other required that all buildings used for storing naphtha and other combustibles should have posted on the outside thereof signs indicating the inflammable nature of the contents, and alleged that the plaintiff had violated both those ordinances by keeping said tank as it did. That portion of the answer was stricken out on motion of plaintiff.

We will first consider the case as it involves the question of the liability of the defendant for damages because of the destruction of the tank and the box over it. The liability of defendant for damages caused by the fire involves other questions, which we will consider later.

I. The fact that the tank was in the street and may have been an illegal obstruction thereof, does not, of itself, prevent a recovery by the plaintiff. Beach on Contrib. Negligence (3 Ed.), sec. 45, says:

**Illegal
Obstruction.**

"It is no defense to an action for negligence that the plaintiff was engaged in violating the law in a given particular at the time of the happening of the accident, unless the violation of law was a proximate and efficient cause of the injury. Some mere collateral wrong-doing by the plaintiff, that has no tendency to occasion the injury, cannot, of course, avail the defendant through whose negligence the injury has been suffered. Thus, for example, driving on the wrong side of the road will not, as a matter of law, prevent a recovery in case of a collision. It is a circumstance to go to the jury on the question of the plaintiff's negligence. So, also, one who places his wagon in the street for the purpose of loading it, in such a position as to violate a city ordinance, may, nevertheless, recover from one who negligently runs into it."

1 Thompson on Negligence, sec. 204, says:

"In many cases the violation of law by the person injured is *collateral* to the accident; in other cases it does not contribute *directly* to it, but *remotely*. Thus, in the case first above stated, we can easily concur with the result reached by the court, because the conduct of the two actors, the plaintiff and the defendant, was concurrent in point of time. But in the second case, the simple fact that the plaintiff, in violation of an ordinance, was standing his hack across the street, surely did not justify the defendant in driving upon it, and breaking it. The mere fact that a person unlawfully exposes his person or property to a negligent injury, does not justify another person in *subsequently* injuring it, when he might have avoided doing so by the exercise of ordinary care; and the rule equally applies in the case where one *unlawfully* exposes his person to an injury."

In *Weller v. Railroad*, 120 Mo. 635, it was held that the driving of a wagon at a rate of speed prohibited by a city ordinance at the time of a collision between the wagon and a railroad train on a highway crossing is such negligence as to prevent a recovery.

In *Schoenlaw v. Friese*, 14 Mo. App. 436, both plaintiff and defendant, in violation of an ordinance, left their

horses unhitched on the street. One ran away and killed the other in the middle of the street. It was held there could be no recovery.

In *Blackburn v. Railroad*, 180 Mo. App. 548, plaintiff, without the permit required by an ordinance, was moving a house along a street and came in contact with an uninsulated electric wire negligently maintained by defendant. It was held that plaintiff could recover, though he was at the time violating the ordinance, such violation not being the proximate cause of the injury. [See also *Reed v. Railway*, 50 Mo. App. 504; *Phelan v. Paving Co.*, 227 Mo. 666; *Adams v. Wiggins Ferry Co.*, 27 Mo. 95.]

We are of the opinion that, outside of the damage done by the fire, the plaintiff's evidence made a case for the jury for at least nominal damages for the injury to the box and tank.

II. The fact that defendant's employees did not know that the tank contained an explosive does not protect it from liability for the damage caused by the explosive. 1 *Shearman & Red. on Negligence* (6 Ed.), sec. 28, says:

"The weight of authority seems to be decidedly against holding the defendant liable for all the actual consequences of his wrongful acts, when they are such as no human being, even with the fullest knowledge of the circumstances, would have considered likely to occur; and, on the other hand, the best authorities seem to be quite opposed to the theory that he should be held liable only for such consequences as he ought himself to have foreseen."

In *Benton v. St. Louis*, 248 Mo. 98, l. c. 110, is this:

"Another rule in point, is that, in cases of negligence, liability does not hinge on whether, by the exercise of reasonable prudence, the very injury complained of ought to have been foreseen. The party charged may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission. [*Dean v. Railroad*, 199 Mo. l. c. 411; *Zeis v. Brewing Assn.*, 205 Mo. l. c. 651; *Brady v.*

Railroad, 206 Mo. l. c. 537; Buckner v. Horse & Mule Co., 221 Mo. l. c. 710; Woodson v. Railroad, 224 Mo. l. c. 707.]”

III. It cannot be said that, as a matter of law, the keeping of the tank at the place and in the manner above shown was negligence *per se*. There may be cases where the amount of explosive kept, the place where it is kept, and the manner of keeping it may be such as to constitute a nuisance *per se*, or to show negligence *per se*; but ordinarily the question as to whether the facts show negligence or a nuisance is for the jury. There is no difference of opinion as to that general rule. [Amsterdam v. Dupont etc. Powder Co., 62 Pa. Super. Ct. 314; Miller v. Chandler, 163 Ky. 301; Dahl v. Valley Dredging Co., 145 N. W. (Minn.) 796; Little v. James McCord Co., 151 S. W. (Tex.) 835; Kerbaugh v. Caldwell, 80 C. C. A. 470; Kinney v. Koopman & Gerdes, 116 Ala. 310; Prussak v. Hutton, 51 N. Y. S. 761.]

The question of negligence in the keeping of the naphtha is for the jury on all the facts in the case, including the fact that the tank was placed as it was, and that no notice of its contents appeared thereon.

IV. The city ordinance as to the keeping of explosives is not properly before us, and we will express no opinion thereon. The cases are almost unanimous in holding that the keeping of explosives in violation of a statute or of an ordinance is negligence. We cite the following: Pinson v. Young, 100 Kan. 542, 164 Pac. 1102; Perry v. Rochester Line Co., 219 N. Y. 60; Molin v. Wis. L. & L. Co., 143 N. W. 624; Smith v. Mine & Smelter Co., 88 Pac. (Utah) 683; Kinney v. Koopman & Gerdes, 116 Ala. 310; Cameron v. K. C. Com. Co., 22 Mont. 312.

The judgment is reversed and the cause is remanded for further proceedings in accordance herewith.

White, C., concurs.

PER CURIAM.—The foregoing opinion of ROY, C., is adopted as the opinion of the court. All of the judges concur.

**HARRY LAUGHLIN v. KANSAS CITY SOUTHERN
RAILWAY COMPANY, Appellant.****Division Two, July 16, 1918.**

1. **DIRECTED VERDICT: Appellate Rule.** The appellate court will not interfere with the action of the trial court in refusing to direct a verdict for defendants where there was substantial evidence to support a verdict for plaintiff.
2. ———: ———: **All Evidence Considered.** The probative force of the substantial evidence necessary to sustain the verdict rendered for plaintiff is not to be tested by that adduced by him alone, although in passing on a demurrer thereto every reasonable inference deducible therefrom is to be taken as true; but it also may be aided by such of defendant's evidence that helps to make out plaintiff's case.
3. ———: **Inferences from Proven Facts: Proximate Cause.** The testimony of plaintiff, a brakeman of a freight train which had stopped to take water, was that after it had started and was running at a rate of five to seven miles per hour he attempted to swing himself upon a car by grasping an iron stirrup and was thereby lifted off the ground and while his feet were in mid-air they struck an obstacle, making a sound as of pieces of iron striking together; that the impact broke his hold on the stirrup, causing him to fall; and that when he recovered from a condition of unconsciousness he saw a keg of spikes near his feet. On the day of the accident the track at the point had been repaired, by taking out old and putting in new ties, and spikes had been pulled from the old ties, and inferably placed in the keg. *Held*, that the jury were authorized in making the inference that the railroad trackmen had left the keg at the place where it was found after the accident, and that under the facts proved and circumstances shown the plaintiff's fall was caused by his legs striking the keg.
4. ———: **Proximate Cause: Question for Jury.** The determination of the proximate cause of an injury, whether it be the original negligence of one party or the intermediate negligence of another, is ordinarily one for the jury.
5. ———: ———: **Character of Evidence.** Direct evidence to establish negligence is not required, but it may be sufficiently shown by facts and circumstances. The proof must do more than raise a conjecture as to the cause of the injury; it must show with reasonable certainty that the cause for which defendant is sought to be held liable produced the injury; but it is only when the evi-

Laughlin v. Railway.

dence with all the inferences that the jury may reasonably draw therefrom is insufficient to support a finding for plaintiff, that the court is authorized to direct a verdict for defendant.

6. **CONTRIBUTORY NEGLIGENCE: Instruction: Burden: Restriction to Plaintiff's Evidence.** Under the Federal Employers' Liability Act an instruction for plaintiff which places upon the defendant the burden of proving contributory negligence is not error. Nor under the circumstances of this case can defendant complain that to such instruction was not added the clause: "unless the jury find from plaintiff's own evidence and the witnesses introduced by him that he was guilty of contributory negligence." The instruction given did not specify what things were done or known by plaintiff, and if defendant desired an amplification or qualification of it in order to present its contention to the jury, it was its duty to ask a proper instruction, appropriate to the evidence and pleading, presenting that view.
7. ———: ———: **Pleading: Proof.** If contributory negligence is not pleaded an instruction presenting it as a defense should not be given; and if pleaded and there is no evidence to support the plea, no instruction on the subject should be given. Where defendant's only plea of contributory negligence was that, if plaintiff was injured, it was the result of his own negligence in attempting to climb on a moving freight train without properly using the stirrup, an instruction declaring that he was guilty of contributory negligence if he did not intelligently use the means at hand to ascertain if there were any pitfalls or obstacles on the right-of-way against which his feet might strike as he attempted by grasping the stirrup to mount the moving car, would have been improper.
8. **NEGLIGENCE: Obstacle Beside Track.** Where it is necessary for a brakeman of a freight train, in order to mount a moving car, to grasp an iron stirrup or hand-hold while running along-side the car, he is authorized in assuming that the right-of-way is clear of obstructions, such, for instance, as a keg of railway spikes.
9. **VERDICT: Excessive: \$10,772: Simulated Injuries.** Where there is substantial evidence that plaintiff's injuries resulting from the accident were a bruise on the thigh and back, hydrocele of the right testicle, rupture of a ligament of the cervical vertebrae resulting in the depression of the seventh vertebra, an injury to the spinal cord, paralysis of the lower limbs involving the motor and sensory nerves, a subluxation of the lumbar vertebrae, anesthesia of the muscles and nerves of the back extending from the shoulders to the waist line, a loss of the reflexes of the knees and feet, traumatic neurasthenia, and that the injuries are progressive and permanent, the court cannot say, even though other medical experts gave contradictory testimony, that the injuries are feigned, or that a verdict for \$10,772 is excessive.

Laughlin v. Railway.

10. ———: ———: **Federal Court Rule.** In cases coming within the purview of the Federal Employers' Liability Act, it is in harmony with the purposes of the statute to adopt the measure of damages sanctioned by the Federal courts, which is that no limitation is placed by the statute on the amount that may be recovered, except that of the damages actually sustained.
11. ———: **Measure of Damages: Other Cases as Guide.** On account of the difference in the facts, there can be no hard-and-fast rule for the measure of damages in a personal injury case. A similarity in the awards in cases of like injuries may serve as a general guide, but it furnishes no exact rule by which the damages may be estimated in a given case.
12. **EXPERT TESTIMONY: Conclusion.** Where the hypothesis is based upon an established fact that plaintiff received certain injuries on a given date, it is not prejudicial error to permit the expert witness to testify that the condition will be progressive and he will be rendered helpless, if the testimony is followed by an instruction that "the opinions of expert witnesses neither establish nor tend to establish the truth of the facts upon which they are based," and similar testimony was admitted without objection.
13. ———: ———: **Waiver.** A litigant will not be heard to complain of the admission of advisory expert testimony over his objection, where evidence of the same tenor has been admitted without his objection.

Appeal from Bates Circuit Court.—*Hon. C. A. Calvird,*
Judge.

AFFIRMED.

Cyrus Crane and Harvey C. Clark for appellant.

(1) The court erred in not directing a verdict for defendant. *Grant v. Railway Co.*, 190 S. W. 586; *McGrath v. Transit Co.*, 197 Mo. 314; *Coin v. Lounge Co.*, 222 Mo. 448; *Coin v. Railway*, 251 Mo. 13; *Allen v. Railway*, 189 Mo. App. 272; *Hartman v. Railway*, 261 Mo. 282; *Trigg v. Land Co.*, 187 Mo. 227. (2) The verdict is excessive and unfair. (3) The court erred in admitting medical testimony offered by plaintiff. *Glasgow v. Railway*, 191 Mo. 347 (Syl. 6); *Taylor v. Railway*, 185 Mo. 239 (Syl. 2) and page 256; *McAnany v. Henrici*, 141 S. W. 633; *Halley v. Light Co.*, 115 Mo. App. 652; *McCreery v. Railways Co.*, 221 Mo. 28. (4) Plaintiff's

Laughlin v. Railway.

instruction 4 was erroneous. (a) As to burden of proof. *Engelking v. Railway Co.*, 187 Mo. 158; *Kappes v. Shoe Co.*, 116 Mo. App. 154; *Sprinkle v. Utility Co.*, 183 S. W. 1072; *Federal Act*; *Holmberg v. Railway Co.*, 153 N. W. 504; *Culp v. Railway Co.*, 87 S. E. 187. (b) For other reasons. *Williams v. Railway Co.*, 257 Mo. 87; *Hearst v. Railway Co.*, 163 Mo. 309.

W. O. Jackson and *C. S. Denison* for respondent.

(1) The plaintiff's evidence was sufficient to prove the negligence charged, and to support the verdict returned. *St. L. & S. F. Ry. Co. v. Clampett*, 154 Pac. (Okla.) 43; 29 Cyc. 622; *Caudle v. Kirkbride*, 117 Mo. App. 412; *Jones v. K. C. F. S. & M. R. Co.*, 178 Mo. App. 528; *Gannon v. Gas Co.*, 105 Mo. 502; *Heibert v. Telephone Company*, 133 Mo. App. 558; *Richey's Fed. Emp. Liab. Act* (2 Ed.), pp. 332 and 333; *Myers v. Pittsburg Coal Co.*, 233 U. S. 193, 58 Law. Ed. 911. (2) The verdict of the jury was neither excessive nor unfair. *Kane v. Mo. Pac. Ry.*, 251 Mo. 13; *Richey's Fed. Emp. Liab. Act* (2 Ed.), sec. 179; *Nashville Ry. Co. v. Henry*, 164 S. W. 310; *Vicksburg Ry. Co. v. Putnam*, 118 U. S. 445, 30 Law. Ed. 257; *Chicago Ry. Co. v. Devine*, 239 U. S. 52, 60 Law. Ed. 140; *Newcome v. N. Y. C. R. Co.*, 182 Mo. 687; *Corby v. Mo. & Kans. Tel. Co.*, 231 Mo. 417; *Copeland v. Wabash Railroad Co.*, 175 Mo. 650; *Griffith v. Railroad Co.*, 98 Mo. 168. (3) The court did not err in admitting medical testimony complained of. *Fullerton v. Fordyce*, 144 Mo. 519; *Halfestein v. Medart*, 136 Mo. 595. (4) Plaintiff's instruction 4 was not erroneous. *Cent. Vermont Ry. Co. v. White*, 238 U. S. 507, 59 Law. Ed. 1433; *Ill. Cent. R. Co. v. Skaggs*, 240 U. S. 66, 60 Law. Ed. 528; *C. & O. Ry. Co. v. Cooper*, 181 S. W. (Ky.) 933; *Seaboard Air Line v. Renn*, 241 U. S. 295, 60 Law. Ed. 1009; *Richey's Fed. Emp. Liab. Act* (2 Ed.), p. 354; *Padgett v. Seaboard Air Line Ry.*, 236 U. S. 672, 59 Law. Ed. 780; *Robert's Inj. Interstate Em.*, p. 317; *Deweese v. Merrimac Mining Co.*, 54 Mo. App. 476, 128 Mo. 426, R. S. 1909, sec. 1850; *Matthew v. Mo. Pac. Ry.*, 142

Mo. 666; *Sherwood v. Railroad Co.*, 132 Mo. 344; *Daudt v. King*, 124 Mo. 105; *Heahl v. St. L. Ore Co.*, 109 Mo. 325.

WALKER, P. J.:—This is an action for personal injuries. Upon a trial, a judgment was rendered for the plaintiff, from which this appeal has been perfected. The action was brought under the Federal statute in the circuit court of Bates County in February, 1914. The plaintiff was, at the time of the alleged injury, a head brakeman on one of defendant's interstate trains. At about three o'clock a. m., October 6, 1913, the train upon which he was employed stopped to take water at a tank north of Stotesbury, a station on the defendant's line in this State. Plaintiff, in the discharge of his duties, got off of the train when it stopped and went back along the side of it towards the rear end to adjust a hot box. After he had performed this duty, he proceeded a short distance further towards the rear end of the train, in the further discharge of his duties, when the engineer whistled off brakes. Plaintiff received a signal from the rear that the train would proceed, which he communicated to the engineer. The train moved forward. He did not, until a number of cars had passed him, attempt to get on the train. When he did, it was moving at the rate of about five or seven miles per hour. He carried a lantern, the light of which extended at least five feet in front of him. While running along the side of the train, he caught hold of an iron stirrup on the side of the car, preparatory to swinging onto same, when his foot struck an obstacle, which broke his hold on the stirrup of the car and he fell to the ground, receiving the injuries of which he complains. The train proceeded on its way for about three miles to a station called Amos, when he was missed. The crew detached the engine, and returning upon it, found him lying by the side of the track near where the stop had been made to taken water. His respiration was almost imperceptible and his pulsation faint. He regained consciousness when his head was bathed with

water. His injuries resulting from this fall we will discuss at length in the opinion. A keg about one-third full of railroad spikes was found some three or four feet south of where he fell, and from three to four and one-half feet from the rail. The keg appeared to have been moved about six inches, from where it had originally stood in the direction the train was going. The car upon which plaintiff was attempting to climb was about eight feet in width, and the distance between the rails over which it was moving at the time of the accident was four feet and eight inches. The body of the car, therefore, projected over and beyond the rails on each side of the track from twenty to twenty-six inches. In the attempt to swing upon the moving car by catching hold of the stirrup, plaintiff was lifted off of the ground and his feet were in mid air, at the time they struck the keg, at a distance of from ten to eighteen inches from a vertical line drawn from the outside of the car to the ground. A fact, indicative of the reason for the location of the keg of spikes near the track, was the presence the day before the injury of a pile of new ties which, on the day of the accident, had been replaced by a pile of old ties; the new ties having been placed in the track at points near where the keg was standing. The spikes in the keg were inferably those not needed in replacing the ties, or those that had been withdrawn from the old ties. Immediately after plaintiff's injury, the fireman of the train on which the plaintiff was employed, under the orders of the conductor, moved the keg further away from the track. There is a conflict in the testimony of the witness of the respective parties in this regard. As a result of the trial, a verdict was returned in favor of plaintiff for \$10,772.

Defendant's assignments of error are (1) the trial court's failure to direct a verdict for defendant at the close of plaintiff's testimony or at the close of the entire testimony; (2) the giving at plaintiff's request, of instruction numbered IV; (3) refusing to set aside a

grossly excessive verdict; and (4) the admission of improper evidence.

I. It has become axiomatic in our procedure that we will not interfere with the action of a trial court in refusing to direct a verdict where there is any substantial evidence to sustain the same.

Direction of Verdict. [Twentieth Cent. Mach. Co. v. Excelsior Co., 200 S. W. 1079; Dunn v. Railroad, 192 Mo. App. 260.] The probative force of such evidence is not to be tested by that adduced by plaintiff alone, although every reasonable inference arising therefrom is to be taken as true; but it may also be aided by any of defendant's evidence that helps to make out plaintiff's case. [Hall v. Mfg. C. & C. Co., 260 Mo. l. c. 365; Stauffer v. Railroad, 243 Mo. l. c. 316.] Plaintiff's testimony was, that as he attempted to swing himself upon the car by grasping the stirrup, his feet or legs struck an obstacle, making a sound as of pieces of iron striking together; that the impact broke his hold on the car and he fell to the ground; that when he recovered from the condition of unconsciousness caused by the fall, he saw a keg of spikes near his feet. These spikes had been pulled from old ties in the track which had been removed and new ties and spikes substituted therefor. A short time before the accident, the track had been repaired at that point. The proof of this betterment, as explanatory of the reason for the presence of the keg and its contents, is aided by the physical fact that old ties that had been used were lying along the track. The inference made by the jury was, that the keg had been left at the point where found, as testified to by plaintiff, and that it had been so left by defendant's trackmen. Having made this inference, they were not required to indulge in speculation to determine if it might not have been placed there by some one other than the defendant. [Myers v. Pittsburg Coal Co., 233 U. S. l. c. 193, 58 Law. Ed. 911.] Generally, the determination of the proximate cause of an injury, whether it be the original negligence of one party or

the intermediate negligence of another, is ordinarily one for the jury. Direct evidence to establish this negligence is not required, but it may be sufficiently shown by inferences from the surrounding facts and circumstances. Proof of this nature, however, must do more than raise a conjecture as to the cause of the injury; it must show with reasonable certainty that the cause for which the defendant is sought to be held liable produced the injury. It is only when the evidence with all of the inferences that the jury may reasonably make therefrom, is insufficient to support a finding for the plaintiff, that the court is authorized to direct a verdict for the defendant. A case should, therefore, be left to the jury under proper instructions, unless the conclusion follows, as a matter of law, that no recovery can be had on any view that may be taken of the facts which the evidence tends to establish. [Hall v. Mfg. C. & C. Co., 260 Mo. 1. c. 365; Wolfgram v. Mod. Wood. Am., 167 Mo. App. 220; James v. Mut. Reserve etc. Assn., 148 Mo. 1; Lac. Nat. Bk. v. Richardson, 156 Mo. 270; Deere Plow Co. v. Sullivan, 158 Mo. 440.] Under these general rules the jury was authorized in making the inference under the facts proved and the circumstances shown that the plaintiff's fall was caused by his striking against the keg, and that the trackmen of the defendant left the keg and its contents at the place where it was found after plaintiff's injury. This accords with reason, and excludes the inference of an impact with another object, or that the keg may have been left, at the point where found, by others than defendant's agents. Numerous reasons support this conclusion: the absence of any other obstruction that could have caused the injury; the evident recent improvement of the track; that the spikes were used only in this character of work; and that the keg and its contents were owned by and in the possession of the defendant. The evidence to sustain the verdict having been found sufficient under the rules stated, the alleged conflict in the testimony, however sharp it may be, cannot be interposed here to affect the verdict. This, for the

Laughlin v. Railway.

reason that in demurring to the testimony, the defendant admitted the truth of plaintiff's proof not only as to the affirmative facts adduced, but of every inference in their favor that the law will warrant. [Hanser v. Bieber, 271 Mo. l. c. 335; Meenach v. Crawford, 187 S. W. l. c. 882; Williams v. Railroad, 257 Mo. l. c. 112.] We decline, therefore, to interfere with the verdict on the ground that the trial court did not sustain a demurrer to the evidence.

II. The giving of instruction numbered IV, at the request of plaintiff, as modified by the trial court, is complained of. It is as follows: "You are instructed

Instructions. that before the plaintiff can be said to have been guilty of contributory negligence, contributing directly to his own injury, if any, it must be shown that he knew, or had reasonable opportunity of knowing of the dangerous condition, if any, of the road-bed of which he complains, and appreciated, or under the exercise of ordinary care and prudence, should have appreciated the danger, if any, encountered, in time to have prevented injury, if any, to his person." To this was added by the court, the following: "And you are further instructed that the burden of proving contributory negligence on the part of the plaintiff is upon the defendant." The burden of defendant's complaint is directed against the addition to the instruction. This is urged as error, because it was not supplemented by the following: "unless the jury finds from plaintiff's own evidence and the witnesses introduced by him that he was guilty of contributory negligence."

This case was tried under the Federal Employers' Liability Act. The United States Courts have uniformly held in proceedings under this act, that as a matter of general law the burden of proving contributory negligence is on the defendant even in trials in states where it is held that the burden is on the plaintiff. [Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 Law. Ed. 1433; Seaboard Air Line Ry. Co. v. Moore, 228 U. S. 433, 57 Law Ed. 907.] No testimony was offered by

defendant at the trial to sustain the contention here made, nor is it intimated in its brief as to the respect in which the plaintiff was guilty of contributory negligence; nor did the defendant ask any instruction or request the modification of the one given to cover the alleged error. Under this state of facts, where, as here, the instruction did not state what the plaintiff did, or knew, or was in a position to know, the failure of the court to give the same as now contended for, is not error. If the defendant desired an amplification or qualification of the instruction in order to present its point of view to the jury, an appropriate request therefor should have been made. If asked, its propriety then would have depended primarily upon whether there was testimony upon which it could be predicated. [Ill. Cent. R. R. Co. v. Skaggs, 240 U. S. 66, 60 Law Ed. 528.]

The Court of Appeals of Kentucky has recently considered the question here involved. Its apposite reasoning merits repetition. It is as follows: "But notwithstanding the Federal statute and the right thereunder to plead and rely upon the defense of contributory negligence, we think it is obvious that when there is no evidence tending to show that the plaintiff was guilty of contributory negligence, the jury should not be instructed on this subject, although that defense may be set up in a pleading. It is just as essential that there should be proof of contributory negligence as that there should be an allegation relying on this defense. If contributory negligence is not pleaded, of course an instruction presenting this defense should not be given, and if pleaded, and there is no evidence to support the plea, there should be no instruction." [Chesapeake & Ohio Ry. Co. v. Cooper, 181 S. W. (Ky.) 933.] But, if the instruction as modified by the court be subject to objection standing alone, its alleged omission is cured by the instructions taken as a whole. Those given for the plaintiff about which there is no question, and hence, not set forth herein, instructed the jury fully as to the facts necessary to be proved to enable plaintiff's damages to be determined, taking into consider-

ation the element of contributory negligence. In addition, defendant's instructions admonished the jury that before the plaintiff could recover, it was necessary that it be shown that he had exercised the ordinary care and caution of a reasonably prudent man in boarding defendant's train. Defendant's concrete contentions in regard to the vice in instruction numbered IV are, that it did not enable the jury to determine whether the plaintiff intelligently employed the means at hand to ascertain whether his footing was secure, and that there were no pitfalls or obstacles in his way, and whether or not it was negligence on his part to mount a moving train when he could have mounted it while standing still. Let us see if these contentions are well founded. Under the issue made by the pleadings, it devolved upon the plaintiff to prove that his injury was due to the negligent leaving of the keg of spikes upon its right-of-way by the defendant. Absent the keg, there could have been no negligence on the part of the defendant, and as a consequence, no injury to plaintiff for which damages might be assessed in his favor. The ground of negligence being thus limited, the plaintiff could not be held to have contributed to same, unless, in attempting to mount the train with knowledge of the keg's presence, he struck it and was thereby injured. Only upon this showing could the damages have been mitigated under the Federal Act, on account of plaintiff's contributory negligence. But defendant's plea of special contributory negligence on the part of the plaintiff was to the effect that, if the latter was injured at the time and place alleged, it was the result of his own negligence in attempting to climb on a moving train without properly using the stirrup. If this had been satisfactorily shown, it would have constituted a failure of such proof as is necessary to authorize a recovery, due to plaintiff's sole and not contributory negligence. There is, therefore, nothing in defendant's answer authorizing the modification of the instruction as now contended for. The duty of the jury upon a failure of proof due to

plaintiff's sole negligence was fully presented by instructions given for the respective parties.

A brief resume of the facts demonstrates the applicatory propriety of these instructions. Plaintiff was injured while in the discharge of his duties as a railroad brakeman, in attempting to mount a moving train. To accomplish this, it was necessary for him to grasp a stirrup or hand-hold, on the side of a car, and mount the same while running along-side of the train. In so doing, he was authorized in assuming that the right-of-way was clear of obstructions. Clothed with this presumption, it was not necessary for him to make an inspection of the right-of-way before attempting to climb upon the car. If this had been attempted, at the time of the accident, which was three o'clock in the morning, with his lantern light limited to a radius of five feet, such attempted inspection would have been ineffectual. Further than this, it would not have been possible for him to make such inspection, because when he grasped the stirrup to mount the car, his face was, of necessity, turned towards the train, and his vision thus directed. Such being the physical conditions, the existence of which, where not affirmatively shown, may be deduced from uniform human experience under like circumstances, the question of the plaintiff not having used means to find out the condition of the surrounding circumstances, as urged by the defendant, is eliminated from consideration. There was no evidence that the plaintiff did not use his lantern as far as it would afford aid in determining his surroundings, or that he did not attempt to mount the train in a proper manner. No defense, however, is urged upon his failure in either of these respects. The instructions given were ample to cover all of these alternatives. We are, therefore, authorized in assuming that the jury, in their deliberations, took into consideration these and all other questions submitted to them.

We have carefully examined the cases of *Williams v. Railroad*, 257 Mo. 87, and *Hurst v. Railroad*, 163 Mo.

Laughlin v. Railway.

309, cited by defendant, and find that the facts in each are so dissimilar from those in the case at bar, that the conclusions reached therein cannot properly be urged in support of the contention here made. There is no merit, therefore, in the objections urged to instruction numbered IV as given, and we so hold.

III. The contention is made that plaintiff's injuries were feigned and that his physical condition subsequent to the accident was due to a prior condition of impaired health. We have reviewed the testimony with **Excessive Verdict.** care in this regard. Except to illustrate the contrariety of conclusions that may be reached by learned members of the medical profession as to the pathological condition of a subject, a detailed statement of this testimony would serve no useful purpose. A summary of same, which we regard as sufficient for a determination of this contention, shows that plaintiff's injuries resulting from the accident were a bruise on his thigh and back; hydrocele of the right testicle; rupture of a ligament of the cervical vertebrae resulting in a depression at the seventh vertebra; an injury to the spinal cord; paralysis of the lower limbs, involving the motor and sensory nerves; a subluxation of the lumbar vertebrae; anesthesia of the muscles and nerves of the back extending over the back from the shoulders to his waist line; a loss of the reflexes of the knees and feet; traumatic neurasthenia; and that the injuries are progressive and permanent.

In the enactment of the Federal Employers' Liability Statute, it was evidently the intention of Congress to render the liability in cases arising under the law uniform throughout the United States. The measure of damages, therefore, in such cases, is to be determined according to the provisions of the act itself and the general common law as administered by the Federal courts, unaffected by State legislation and the decisions of State courts, except as they may announce the common law. While, therefore, the difference between the measure of damages as determined by our

courts and that of the Federal courts is but slight, it is more in harmony with the purpose of the statute to adopt, in cases coming within its purview, the measure of damages sanctioned by the Federal courts. This course has been pursued in other jurisdictions (*Nashville Railway v. Henry*, 158 Ky. 88, 164 S. W. 1. c. 314; *Panhandle Railway v. Brooks*, 199 S. W. (Tex.) 665), and is recognized as the proper rule by the Federal courts (*Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 499, 58 Law Ed. 1068, L. R. A. 1915C 1, Ann. Cases, 1915B 475; *Chicago Ry. Co. v. Devine*, 239 U. S. 52, 60 Law Ed. 40; *Vicksburg Ry. Co. v. Putman*, 118 U. S. 545, 30 Law Ed. 257).

No limitation is placed by the statute on the amount that may be recovered, except that of the damages actually sustained. [*Chicago Ry. Co. v. Devine*, *supra*; *Devine v. Chicago*, Etc., 266 Ill. 248; *Thornbro v. Kan. Railroad Co.*, 91 Kan. 684, Ann. Cas. 1915D 314; *Nash v. Minneapolis Ry. Co.*, 131 Minn. 166; *Grybowski v. Erie Railroad Co.*, 95 Atl. (N. J.) 764.] There cannot be, on account of the difference in the facts, any hard-and-fast rule for the measurement of the damages. A similarity in the awards in cases of like injuries may serve as a general guide, but it furnishes no exact rule by which the damages may be estimated in a given case. [*St. Louis Railroad Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185, *affd.* 35 Sup. Ct. R. 704.] The most reliable rule for the guidance of an appellate court in determining whether a verdict is excessive, is that, if sustained by substantial evidence, it will not be disturbed, unless the amount is such as to shock the judicial conscience, or there are indications that the jury was swayed by passion, prejudice, or in some way unduly influenced.

Viewing this verdict, therefore, in the presence of the catalogue of ills suffered by the plaintiff, as a result of his injury and, measuring the jury's estimate of his damages by the findings in other as nearly similar cases, of which the books bear witness, we are not impressed with the force of the contention that the verdict is so

excessive as to run counter to the rule stated. On the contrary, it is in our opinion, in the face of the facts as to plaintiff's condition, but a conservative compensation for the damage sustained. We are mindful of the fact that there was a conflict in the testimony of the experts as to the physical condition of the plaintiff. It was, however, within the province of the jury to determine which of the conflicting theories was correct. [Kane v. Railroad, 251 Mo. 13, 157 S. W. 644.] They have so determined and in the absence of even an intimation of bias, or other influence than the force of the facts, we will not disturb their finding.

IV. It is urged that error was committed in the admission of the testimony of one of the physicians introduced by the plaintiff. This inquiry was propounded to him: "Doctor, supposing that the injury
Expert
Testimony. you found was the result of an injury which happened on the 6th day of October, 1913, have you a judgment as to whether or not that condition will be progressive?" After the interposition of a general objection by counsel for defendant, which would not authorize a review of this contention unless the inquiry was wholly inadmissible, the witness answered: "I think it highly probable that the trouble will progress, in view of what I have seen and the length of time he was hurt." The further question was asked the witness: "and if progressive, what would be the result?" To which he answered: "He will be rendered helpless." The objection to this testimony is that it permitted the witness to express his judgment on a probability or to base an opinion upon an opinion. The hypothesis upon which the inquiry was made was based not upon an opinion, but an established fact, viz., that the plaintiff had struck the keg in attempting to mount the car, and had thereby sustained the injuries which had been found by the witness upon a personal examination, as a physician, to exist. At best, testimony of this character is advisory and not conclusive. Cognizable of this fact, the court gave the jury the usual instruction as to the weight to be

given to the testimony of witnesses of this class. They were told, among other things, in the stereotyped language usually employed in this instruction: "that the opinions of expert witnesses neither establish nor tend to establish the truth of the facts upon which they were based." Thus guided, and otherwise fully instructed as to their province as judges of the weight and credibility of all the witnesses who had testified, the possibility of their being prejudiced or influenced one way or the other in reaching their verdict by the testimony of this witness, was exceedingly remote, if it existed at all.

However, the force of defendant's contention in this regard is dissipated when we find from the record that the same inquiries here complained of were propounded to and answered in a like manner by two other physicians, and no objections were interposed to their testimony. One will not be heard to complain of the admission of testimony over his objection, where evidence of the same tenor has been admitted without his objection. [Masonic Mutual v. Lackland, 97 Mo. 137; McPherson v. Andes, 75 Mo. App. 204; San Antonio v. Potter, 31 Tex. Civ. App. 263; Douglass Land Co. v. Thayer Co., 107 Va. 292; Galveston, etc., v. Baumgarten, 31 Tex. Civ. App. 253.]

This contention, therefore, having lost its force on account of the attitude in regard thereto of counsel for defendant at the trial, it is not necessary to discuss its alleged inadmissibility on the ground that it in any wise invaded the province of the jury, as we held in *Deiner v. Sutermeister*, 266 Mo. 505 and *Castanie v. U. Rys. Co.*, 249 Mo. 192. The contention is, therefore, overruled.

It follows, therefore, that the judgment should be affirmed and it is so ordered. All of the judges concur.

THE STATE v. O. L. KOONTZ, Appellant.

Division Two, July 16, 1918.

1. **UNCONSTITUTIONAL STATUTE: Application.** A statute may be unconstitutional as to part of its subject-matter and valid in its application to other parts.
2. **INTOXICATING LIQUOR: Delivery by Purchaser's Agent.** Section 2 of the Act of 1907 (Sec. 7227, R. S. 1909) made unlawful the transfer of the possession of intoxicating liquor from one person to another, in a Local Option county, when by the act of transfer there was no change of ownership. That section made the delivery to the purchaser by the purchaser's own agent a violation of its provisions.
3. ———: ———: **Direct Delivery to Purchaser by Carrier.** Section 7228, Revised Statutes 1909, is an exception to the operation of Section 7227, and relieves of its unlawful character the delivery of intoxicating liquor by one person to another in a Local Option county, where the deal, or order, is direct between the seller outside and the purchaser inside such county, and where the agency of no person who would profit by the traffic except as a common carrier intervenes between such seller and purchaser.

Appeal from Cass Circuit Court.—*Hon. Ewing Cockrell,*
Judge.

REVERSED.

J. W. Jamison and *J. S. Brierly* for appellant.

(1) Martin had the right to order and have sent direct to him intoxicating liquors for his own or family use. Sec. 7228, R. S. 1909; *State ex rel. v. Brewing Co.*, 270 Mo. 109. (2) Inasmuch as the beer was both ordered and received by Martin in a lawful way and for a lawful purpose, neither the railway company, nor its agent, Koontz, violated any statute in connection with the transportation and delivery of it to Martin. *State v. Brown*, 188 Mo. App. 248; *State v. Rosenberger*, 212 Mo. 648; *State v. Theodore*, 191 S. W. 422; *Southern Express Co. v. State*, 66 So. (Ala.) 115. (3) The

trial court committed error in holding and declaring at the request of the State and of its own motion that Sec. 7228, R. S. 1909, was unconstitutional, and, therefore, void, and in giving, over appellant's objections and exceptions, declarations of law to that effect, and in refusing appellant's declaration in the nature of a demurrer to the evidence. *State v. Theodore*, and other authorities cited above.

Frank W. McAllister, Attorney-General, *Henry B. Hunt*, Assistant Attorney-General, *J. R. Nicholson* of counsel, for respondent.

(1) The title of an act is the conclusive index to the legislative intent; and the body of the act must be germane to the subject designated in title. Sec. 28, Art. 4, Mo. Cons.; *Laws 1907*, p. 231; *City of Kansas v. Payne*, 71 Mo. 162; *State v. Coffee & Tea Co.*, 171 Mo. 642; *State v. Burgdoerfer*, 107 Mo. 30. (a) The title need not express limitations in the body of the act. 36 Cyc. 1029; *Neuendorff v. Duryea*, 69 N. Y. 557; *Mt. Vernon Co. v. Frankfort Co.*, 111 Md. 568. (b) But where the title is restrictive, the act must be also. 36 Cyc. 1029; *State v. Rawlings*, 232 Mo. 557; *Ex parte Knight*, 52 Fla. 147; *West v. State*, 50 Fla. 160; *Railway v. Byrne*, 119 Tenn. 289. (2) Sec. 7228, R. S. 1909, has reference solely, to Section 7226. Said Section 7226 has been declared unconstitutional; hence, Section 7228 is unconstitutional and falls with Section 7226. *State v. Rawlings*, 232 Mo. 558; *State v. Theodore*, 191 S. W. 424. (3) The defendant, agent of the railway company, is liable, as he held for and delivered the goods to the consignee. *Hays v. State*, 13 Mo. 246; *State v. Brown*, 151 Mo. App. 351; *State v. Boehler*, 148 Mo. App. 620; *State v. Handler*, 178 Mo. 38.

WHITE, C.—The appellant was found guilty of delivering liquor to another person, in violation of Section 7227, Revised Statutes 1909. He claimed in defense that he was protected by the exception mentioned

in Section 7228. The Circuit Judge held that the latter section afforded no protection, because unconstitutional, and the appeal was to this court on account of the constitutional question.

The sections mentioned, together with Section 7226, are a part of the dramshop law of this State, enacted in 1907. The Act of 1907 contained three sections which are now sections 7226, 7227 and 7228, Revised Statutes 1909 (Laws 1907, p. 232), as follows:

“Section 1. (7226). It shall be unlawful for any person or persons not a licensed dramshop-keeper or by law authorized to sell liquor as a wholesaler, to order for, receive, store, keep or deliver, as the agent or otherwise, of any other person, intoxicating liquors of any kind.

“Section 2. (7227). No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the Local Option Law, any intoxicating liquors of any kind whatsoever.

“Section 3. (7228). Provided, however, that nothing in *this act* shall be construed to prohibit any person from ordering liquor for his own or family use, where such liquor is sent direct to the person using same.”

In the Revision of 1909, the words “this act” were changed to read (Sec. 7228) “the two next preceding sections.”

There was an agreed statement of facts in the circuit court, which set out that the Local Option Law was in force in Cass County; that the defendant, O. L. Koontz, was agent of the Missouri, Kansas & Texas Railway Company, and as such delivered one case of beer to one Charles Martin in Cass County, “for the personal use of said Charles Martin,” and that “said liquors had been ordered by the said Charles Martin of and from George Muehlbach Brewing Company, a liquor dealer at Kansas City, Missouri,” and were by that company consigned to the said Charles Martin by a freight shipment over the lines of the said Missouri, Kansas & Texas Railway Company.

I. The defendant claims that he was within the proviso of Section 7228, because the liquor which he delivered was ordered for the personal use of Charles Martin to whom he delivered it. The Circuit Court held that section unconstitutional, because by its terms the proviso related only to Section 7226; that Section 7226 having been declared unconstitutional by this court in the case of *State v. Rawlings*, 232 Mo. 544, the proviso therefore would fall with the section to which it relates. The reason Section 7226 was declared unconstitutional was because the subject-matter covered by that section was not clearly expressed in the title of the bill when the Act of 1907 was passed. It is only necessary to refer to the *Rawlings* case for an explanation of the ruling.

Now it is obvious if Section 7228 refers only to Section 7226, then it does not matter for the purpose of this case whether it is unconstitutional or not, because this case arises under Section 7227, which was declared in the *Rawlings* case to be constitutional. But if 7228 relates to 7227, and provides an exception to the operation of that section as well as of 7226, then to that extent it is not necessarily unconstitutional, for a statute may be unconstitutional as to part of its subject-matter and valid in its application as to other parts. [6 R. C. L., p. 130.] It is important, therefore, not only to determine whether Section 7227 applies to this case, but also whether Section 7228 relates, as a proviso, to Section 7227 as well as to Section 7226.

II. Doubtless the statute under consideration was enacted to reinforce the Local Option Law. Already Section 7243, Revised Statutes 1909, made it unlawful for any person in a Local Option county to "directly or indirectly sell, give away, or barter in any manner whatever any kind of intoxicating liquors." This language is comprehensive enough to cover every case where the ownership of property of that kind is passed from one to another; in-

**Application
of Proviso.**

**Delivery
by Own
Agent.**

toxicating liquor could not be transferred by sale or by gift, directly or indirectly, in any manner whatever. All that remained of the traffic in such liquors, not prohibited by the statute, was the transfer of possession from one person to another, and the keeping for the use of another person, without a change of ownership.

The Act of 1907 then evidently was intended to reach every case of such transfer. Section 2 (7227) covers the case of a person who keeps or delivers liquor *for* another person, or *to* another person whether or not title or right of property is transferred by the act. This would include the case of any person who acts as the agent of the seller or the buyer, when the title has already passed.

This court construed the Local Option Law several times before Act of 1907 was passed. It was held in several cases that where intoxicating liquor was shipped by a common carrier, from a county or city in the State where it was lawful to sell it, to some person in a Local Option county, the shipper was not guilty of a violation of the law, because the "delivery" was at the point of shipment where it was lawful to sell it, and not at the point of destination where it was unlawful to sell it, that the carrier was the agent of the purchaser and not of the seller. [State v. Wingfield, 115 Mo. 428.] This was held to be the case even where the liquor was consigned C. O. D. [State v. Rosenberger, 212 Mo. 648, l. c. 654.] Under those rulings the delivery to Martin was in Kansas City where he ordered the beer consigned to him. The carrier then became and was his agent in carrying the liquor from Kansas City to Cass County, where he received it. It has been held that delivery to the purchaser by the purchaser's own agent, is a violation of the act, as will be seen by the cases cited below. The defendant was guilty of the violation of Section 7227, unless Section 7228 recites an exception to its operation.

III. The case of State v. Theodore, 191 S. W. 422, cited by respondent, was where the defendant was

charged with a violation of Section 7227. He kept and stored a quantity of liquor in Barton County. This court reversed a conviction for violation of Section 7227 on the ground that the liquor which he kept and stored was not for delivery to any person in Barton County, a Local Option county, but was stored and kept for the purpose of conducting a mail order business and delivery in Kansas. The opinion indicated that the section (7228) does not constitute a proviso to Section 7227, and held the defendant not guilty, not because he was protected by Section 7228, but because his act is not covered by Section 7227. The observations regarding Section 7228 were *obiter* and the majority of the court concurred only in the result.

This court, in the case of State v. Burns, 237 Mo. 216, l. c. 223, held the defendant guilty on this state of facts: He was going from Mt. Vernon, Lawrence County, to a neighboring town, when a friend named Hixon handed him a half dollar and requested him to purchase a pint of whiskey. Defendant purchased the whiskey and when he returned to Mt. Vernon he was arrested before delivering it, for violation of Section 7227 in keeping it for the purpose of such delivery. There the defendant was the agent of the purchaser and the whiskey was Hixon's property.

The opinion mentioned Section 7228, apparently assuming it to be valid as a proviso to Section 7227, and uses this language (237 Mo. l. c. 222-3):

“True, the whiskey in question was wanted by Hixon for his own use. It is also true, as argued by the counsel for defendant, that if, under the last named section, ‘a person has a right to order whiskey and have it sent to him, some person or persons must be allowed to bring it.’ The statute, however, plainly contemplates, by the expression ‘where such liquor is sent direct to the person using same,’ that the buyer shall deal in his own name with the seller, and that the seller shall send the whiskey directly to the buyer, knowing to whom he is sending it. Whether the order goes by mail or by messenger may not be important, nor

whether the article is sent by express or by messenger, but it is important that the transaction should be between the one who orders for his own use and the dealer who fills the order. Otherwise, one could traffic in whiskey in defiance of the statute by securing his customers and payment in advance, then buy the whiskey in his own name, deliver it to his respective customers and, if charged under the statute, say, 'I was merely a messenger for persons who ordered for their own use.' "

The court then says (p. 223): "Doubtless a *mere carrier* or messenger, in the case of a *direct order* as explained above, may retain lawfully, possession for such time as is convenient and customary for delivery."

The Kansas City Court of Appeals in case of State v. Lane, 193 S. W. 948, held the defendant guilty under a state of facts quite similar to those in the Burns case. The court indicated that Section 7228 furnished an exception "if the transaction showed that the defendant was a 'mere messenger' delivering the liquor in a direct transaction between the seller and the purchaser or between the receiver and the furnisher of the liquor."

In the case of State ex rel. v. Brewing Company, 270 Mo. 100, the prosecuting attorney of Adair County sought to restrain the defendant Brewing Company from shipping beer into Adair County, a Local Option county. The defendant had its place of business at Quincy, Illinois, the liquor in question was consigned to the railroad company and sent in a package C. O. D. to a person in Adair County. The court cited the Rosenberger case, *supra*, and held that the liquor was delivered to the purchaser at the point of shipment in Illinois, and found the defendant not guilty, because the delivery of the beer was not in Adair County, and "because Section 7228, Revised Statutes 1909, authorized any person in Adair County to order liquor for his own use, or that of his family when it is sent directly to him." In the case of State v. Brown, 188 Mo. App. 248, the defendants were charged with violation of Section 7227. They hauled several barrels of merchandise from the railroad station to a drug store at Worthington,

in Adair County, a Local Option county. It was claimed that the barrels contained bottled beer, but they bore no external evidences of the nature of their contents. The defendants delivered the merchandise in ignorance of what the barrels contained, and they were held not guilty for that reason. The court cites the Burns case, *supra*, and uses this language, l. c. 251: "Defendants, at the time of their arrest, being in possession of the beer, *not as common carriers*, but as servants of the purchaser, were 'keeping it' within the prohibition of the statute, providing they knew what they were transporting and intending to deliver to their employers was beer, imported into the county for the purpose of being disposed of in violation of the Local Option Law."

The observations of this court in the Burns case, and the Brewing Company case, *supra*, indicate a construction by this court of Section 7228, which makes it an exception to the operation of Section 7227, as well as Section 7226. It reaches a case of delivery by one person to another in a Local Option county where the deal, or order, is "direct" between the seller outside and the purchaser inside the dry territory, where the agency of no person who would profit by the traffic except as a common carrier, intervenes between such seller and purchaser. It would apply where the order is direct and the shipment direct, by the purchaser's agent, as in this case.

The judgment is reversed and the defendant discharged. *Roy, C.*, concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE ex rel. M. O. DANCIGER & COMPANY
v. PUBLIC SERVICE COMMISSION et al., Ap-
pellants.

Division Two, July 16, 1918.

1. **PUBLIC SERVICE: Motive for Discontinuance: Law of Case.** The motive for discontinuing the supply of electricity to citizens of a town by a firm which for sometime had essayed to furnish it to some of them, is of no concern to the courts in determining whether said firm had a legal right to discontinue the service. If the citizens are not under the law entitled to the service, no motive, however reprehensible, for discontinuing it, can serve as a sufficient reason to any court to compel a restoration of it.
2. ———: ———: **Public Utility.** If the firm which had essayed to sell electricity to a limited portion of the citizens of a town is a public utility, no ill-feeling growing out of a Local Option election and no lack of facilities to furnish the service, will serve as an excuse for discontinuing it, because the Public Service Commission has power to compel the firm to provide reasonable and ample facilities; but if it is not a public utility, no excuse is necessary.
3. ———: **Public Utility: Corporate Powers: Ultra Vires.** In determining whether or not a corporation is a public utility, the important thing is not what its charter says it may do, but what it actually does. If the things it does constitute it a public utility, it will not be heard to say that those things are *ultra vires* of its charter powers, or to urge its own wrongful aggressions to escape its obligations to render the public service.
4. ———: ———: **Definition: For Public Use Understood.** While the statute defining an "electrical corporation" and an "electric plant" does not contain the words "for a public use," they are to be understood and to be read into it. An electric plant must of necessity be devoted to a public use before it is subject to public regulation.
5. ———: ———: **Private Person.** A single person, having constructed an electric plant solely for private use, may, by holding himself out as willing and ready to serve the public, by such profession and by the furnishing of a general public service, become a public utility.
6. ———: ———: ———: **Subject to Full Regulation.** If a private person is a public utility, he is such within the whole purview

and for all inquisitorial and regulatory purposes of the Public Service Commission Act.

7. ———: ———: ———: **This Case.** A brewery corporation, whose stock was owned by M. O. Danciger and his brothers, was engaged in the brewing of beer, in a town of 1000 or 1500 inhabitants. It installed a plant for producing electric light and operating by electricity the machinery used in the brewery. Discovering that it was able to produce more electricity than it needed for those purposes, it began to make special private contracts to furnish current for light and power to certain private persons within three blocks of its plant, about thirty in all, and also furnished thirty street lights, for five or six of which it received \$19.50 per month, the others being furnished gratuitously. It was not incorporated for this purpose, and the contracts were made with M. O. Danciger & Company, which was simply a trade name of M. O. Danciger. He had no distributing system, and the persons who bought electricity from him constructed their own wires to the electric plant and installed their own meters. He had no franchise or license from the town, neither in his own name or his trade name or any other, nor did he have any permission to erect poles or wires upon the streets or alleys, nor did he have or assert the power of eminent domain, nor did he at any time expressly profess a readiness or willingness to furnish electricity to all persons within the town, or to all those within the restricted three-block area. *Held*, that he was not a public utility, and the Public Service Commission has no power to compel him to continue the service or to regulate it. It cannot be said that a private company which undertakes to sell no more than its surplus electricity to a few near-by citizens, and not to the public generally, is engaged in a public business.

7. ———: **Police Power: State Regulation: Private Property.** The police power is bottomed and wholly dependent upon the devotion of private property to a public use. The Constitution forbids the regulation of and the exercise of inquisitorial authority over property devoted to private use, and before the State can exercise such regulation the property must be devoted to a public use.

Appeal from Jackson Circuit Court.—*Hon. C. A. Burney*, Judge.

AFFIRMED.

Alex Z. Patterson, General Counsel, *James D. Lindsay*, Assistant Counsel, and *B. Denny Davis* for appellant, Public Service Commission.

(1) The relator is engaged in a business of the kind defined in the Public Service Act, and is subject

to the jurisdiction of the Commission by the plain terms of the act. Subsections 1 and 5 of Section 16 and Subsections 12 and 13 of Section 2, Publ. Serv. Act of 1913. (2) The nature and extent of the business done by relator constitutes it a public service company. Neither a corporate charter as a public service company, nor a franchise from a city, nor the lack of them, are determinative. The nature of the business and of the service rendered is the decisive test and must control. *Terminal Taxicab Company v. Kutz*, 241 U. S. 252; *German Alliance Insurance Company v. Lewis*, 233 U. S. 389; *Ratcliff v. Wichita Union Stock Yards Company*, 6 L. R. A. (N. S.) 834 and note; *VanDyke v. Geary*, 244 U. S. 39; *Del Mar Water, Light and Power Company v. Eshleman*, 167 Cal. 681, 140 Pac. 948; *State ex rel. Subway Company v. St. Louis*, 145 Mo. 575; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; 1 Wyman, Public Service Corporations, sec. 50. (3) It is not necessary that a company should serve all of the public to give it the character of a public utility. No utility serves all of the public. The public does not mean everybody all of the time. But what is meant, is a service which affects so considerable a portion of the public, that it is public in the same sense in which any other may be called so. *Terminal Taxicab Company v. Kutz*, 241 U. S. 255; *Peck v. Tribune Company*, 214 U. S. 190; *Cawker v. Meyer*, 147 Wis. 320. (4) The business of furnishing electric current for light and power within a city is one of that large class of concerns which has always been held to be a business clothed with a public interest, and to be subject to regulation by the public. Exhaustive note in *Ratcliff v. Wichita Union Stock Yards Company*, 6 L. R. A. (N. S.) p. 834. (5) So long as relator undertakes to do a business, and to render a service public in its nature, relator cannot be permitted to discriminate or arbitrarily refuse service. Section 68, subsection 3, Pub. Service Act. (6) The provisions of the act are to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Section 127, Public Service Act.

I. J. Ringolsky, M. L. Friedman and Ringolsky & Friedman for respondent.

(1) Under the facts and the law respondent is not a public utility. State ex rel. Public Commission of Washington v. Spokane & I. E. R. Co., 154 Pac. 1111; Utilities Commission ex rel. Wabash v. Ill. Central, 113 N. E. 162; Cawker v. Meyer & R. R. Commissioners, 147 Wis. 320; Delmar Water, Light & Power Co. v. Eshleman, 140 Pac. 591. (2) The Public Service Act does not give the Commission jurisdiction over plants generating electricity for their own consumption and selling surplus. The act confers jurisdiction only over electrical companies having the right by charter, franchise, special or general laws, to use the streets and highways for the sale of electricity. Laws of State of Washington, 1911, pp. 534, 544; Public Service Act, Sec. 2, Art. 1; Sec. 64, Art. 4. (3) Assuming *arguendo* that the respondent is a public utility the Public Service Commission had no jurisdiction in the instant cases. Lusk v. Atkinson, 268 Mo. 116; Atchison, Topeka & S. F. Ry. Co. v. Public Service Com., 192 S. W. 462; Sec. 83, Laws 1913, 619; State ex rel. Payne v. Kinloch Tel. Co., 93 Mo. App. 349; State ex rel. v. Jones, 141 Mo. App. 304; State ex rel. v. Water, Light Co., 249 Mo. 649; Public Ser. Electrical Co. v. Board, 96 Atl. (4) The Commission has no authority, right or prerogative to designate or select certain specific persons out of many persons as the persons to whom service must be given.

FARIS, J.—This is an appeal by the Public Service Commission and others from a judgment of the circuit court of Jackson County, annulling an order of the Public Service Commission (hereinafter called for brevity simply "Commission") in a case wherein one W. H. Roach, was complainant. After the conventional motions, the Commission and the complainant appealed.

This case is one of three of similar character and bottomed upon identically similiar facts. The relief

severally sought was an order upon M. O. Danciger (trading as M. O. Danciger & Company) to compel him to restore electric service to the complainants, which service, it was alleged, had been by said Danciger cut off without any legal excuse therefor. The complaints filed before the Commission by the three several complainants were similar in all substantial respects, and wholly similar except that the complaint filed in the instant case averred as a motive for the cutting off of the service, that discontinuance was due to ill-feeling engendered by the attitude of complainant in a Local Option election.

It was shown by the testimony adduced upon the hearing before the Commission that the Royal Brewing Company, situate at Weston, Missouri, is a corporation, the stock of which is largely, if not wholly, owned by respondent M. O. Danciger and his brothers. The Royal Brewing Company is engaged in the brewing of beer and in the manufacture of so-called soft drinks. The town of Weston contained, according to the last census, a population of 1019 persons, though the evidence adduced tends to show roughly that it now contains about 1500 population. Some six years before the hearing the Royal Brewing Company (hereinafter called for brevity the "Company") installed in its brewing plant the necessary machinery for producing electric light solely for its own use in lighting its property. During the last three or four years preceding the hearing before the Commission, the Company has also been using the electric current so generated for the purpose of operating by electricity a large part of the machinery used in its brewing business. Shortly after the Company put in its private electric plant it discovered that it was able to produce more electricity than was necessary for its own use in lighting and running its plant. It thereupon began to make special private contracts to furnish, under the conditions and circumstances below named, electricity for lighting and power purposes to certain private citizens of the town of Weston, located within a radius of three blocks of the

Company's plant. Subsequently it began furnishing to the town of Weston lights for some of the streets and alleys thereof. At the time of the filing of this complaint between twenty and thirty of the business houses, and some ten residences within the area mentioned, were being lighted or partially lighted by electricity from the Company's plant. At this time the city was being furnished thirty or thirty-two lights, for which it paid for only five or six of these the sum of \$19.50 per month. The remainder of the lights were furnished gratuitously. All of the electrical energy sold is delivered to consumers at the Company's plant. For, says one of the complainants, "we were told if we would run the line we could have the service." The Company has no distribution system for supplying any of these private persons; nor is it incorporated for this purpose, nor is this purpose mentioned among the things which as a corporation it may do; nor has it a franchise from the town of Weston as an electric lighting company, or any other permission to enter or cross the streets and alleys thereof. It does not itself place or construct any poles or wires upon the streets, alleys or public places of the city; nor does it own any poles or wires. The consumer desiring the surplus light or power furnishes his wire and poles, and bears all cost of constructing the line for transmitting the electric current from the Company's plant to the place of consumption, or he "taps in" on some other private owner's wire. The actual work of construction and installation is usually done, if not always, by employees of the Company, in which case the Company is reimbursed by the private consumer. In some instances the contracts for this installation were made directly with the employees themselves, and the work was done after working hours. In some cases the amount of current consumed is measured by a meter, which meter belongs to the consumer; and in others—the greater number of cases—the amount paid is governed by a flat rate.

The sale of the surplus current, although it is generated by the Company, and with the Company's

machinery, is conducted with consumers by respondent under the said trade name of "M. O. Danciger & Company." The reason for this arrangement was upon the hearing, without any contradiction thereof, thus explained by respondent: "The brewery didn't have a right to go into the lighting business, and I took it up with my brothers, and they said if you have got any friends you want to serve, you had better [not] serve them from the brewery company as a corporation, and that is how I happened to start this M. O. Danciger & Company. I got a little set of books at that time. I didn't really know what they were paying for their lights. Some of them were on flat rates, and every time a man would go around to collect, they would say their next door neighbor's bill wasn't as big as theirs and you must not be charging him as much per kilowatt as you are me. Then I had this form printed they offered in evidence, and gave them around a time or two as receipts. That is how that form happened to be printed, to keep down arguments."

The complainant, Roach, is the owner of a weekly newspaper published in Weston, called "THE WESTON HERALD." About a year, or a year and a half, before the matters here in controversy arose, complainant bought this paper and printing plant from one Taylor. Power and lights were then being furnished by the Company through respondent upon the arrangement above set out to Taylor, and after complainant's purchase of the newspaper the service was continued until June 7, 1916, when the wires were suddenly cut by Danciger, without prior notice, and the service discontinued. Upon demand made for reinstatement of the service, and upon a refusal thereof, this proceeding was brought.

The printed form of receipt mentioned by respondent as having been given by him "*a time or two as receipts*" to his customers, contained on the reverse thereof a statement of the rates to be charged customers for current furnished for lights. No reference was made in definite kilowatts to rates for motor service,

but the printed form of receipt contained on the back thereof the statement: "*Special rates for motors upon application.*" We mention this specifically, because much importance is attached to it by appellants. So far as the record shows these rates were not contained on any receipt after October 15, 1915, and were given out only once or twice *to customers only* prior to that time. No receipt issued after October 15, 1915, contained mention anywhere of the rates charged or of any special rate for motors.

The area of three blocks from the Company's plant is all of the town of Weston which was given any service, and not nearly all of the residences and businesses in this area have this service. The district within three blocks of the plant comprises only about one-fifth of the town of Weston since the Company's plant is situate on the extreme edge of the town. The record discloses that a number of persons, both within the area of three blocks, and without the same, made requests for service, and were refused, because respondent was, he says, unable to furnish this service by reason of lack of surplus current.

There are no contracts in writing with any of the customers of respondent. The arrangement for furnishing the five or six lights to the city, for which the city pays, was made verbally, and is thus related by a witness who was a member of the Board of Aldermen when this arrangement was made: "I spoke to Mr. Danciger, about it, and he said he had no franchise or anything, and I asked him as a favor if he would not permit us to put a few lights down town. Our lights were bad. He said, well if you stretch your own wires and be responsible for the up-keep, that he was not to be responsible for any damage or anything, that he would furnish a few lights. . . . Said, of course sometimes they go out. So we put in at that time about three lights, and then after we got by the fire department, he put a light on the bridge. He wired the fire department *gratis*. . . . The final arrangement was just made between me and Mr. Danciger.

Then I took it up with the Council and told him we were willing. . . . I asked him if he would come down to the Council, and he did. . . . He said he could not guarantee us any service, any more than he would do the best he could. He could not guarantee us any service for any length of time or anything. He said, and I knew it to be a fact, that his generator was there for his own use for lighting." Fairly construed the testimony of Danciger corroborates this witness, and no one contradicts him.

Upon the trial respondent, testifying for himself, was asked to state his reason for cutting off the service from the complainant. His answer was this: "The first reason was, that I wasn't holding myself out as a light company, that I was ruining my machinery, that I was running at a loss at the plant. I have electric-driven machinery that I wasn't able to use, using steam machinery that cost twice or three times the amount of money to operate, and another reason was that these men who were using the current were the last men that got the service. That was another reason. The third reason was that I was furnishing these people current at a loss, doing it as a favor and they were abusing me personally, and trying to destroy the business I had, all I had in the world, and I didn't feel any too friendly. Those are the different reasons for cutting off that current."

The Commission after taking voluminous testimony in the case made a report in which it held that respondent was conducting a public utility; that he owed the duty of serving complainant, and that the discontinuance of the service was without reasonable excuse, and thereupon entered an order that the service be restored. From this order respondent herein took the case by the statutory writ of review, or *certiorari*, to the circuit court, of Jackson County, wherein upon a hearing *de novo* the order of the Commission was annulled. Thereupon the Commission and the complainant Roach appealed.

Much of the record in the case is taken up in an effort to prove and disprove the wholly irrelevant matter of motive. It was strenuously contended at

Motive. the hearing, in the briefs, and upon argument.

that the cutting off of service to this complainant was wholly due to ill-feeling arising from the arid attitude of the complainant and his newspaper in a Local Option election. It is too plain for argument that we are not to determine this matter on a consideration of the antecedent reasons which brought about this proceeding. Whether the action complained of was brought about by reasons which in morals are just or unjust, good or bad, is no concern of the courts and cannot in the remotest way affect the law of this case. This is so because if complainant is entitled to service, he is entitled to it as a matter of law, and if he is not under the law entitled to it, no motive, however reprehensible, for discontinuing the service will serve as a reason for any court to compel the restoration thereof. It is but remotely apposite on the point whether the Local Option question or a lack of facilities to furnish the service constituted the dominating motive. For if respondent is a "public utility," neither excuse will serve; because the Commission has power to compel him to provide reasonable and adequate facilities. If he is not such utility, no excuse is necessary. It is therefore but to pad the case with immaterial irrelevancies to take up the time of counsel, and of this court, with such questions.

There is but one question in the case. That is a question of law, and is, to-wit: Is M. O. Danciger, **Public Utility.** trading as M. O. Danciger & Company, engaged in doing such business as by law permits the regulation thereof by the Public Service Commission Act?

In this connection, we may mention in passing, respondent contends that M. O. Danciger & Company cannot be compelled to furnish the service in question. because, since the electric current used is obtained from the brewery company, which is a corporation, the result of such an order would be tantamount to, and result in forcing the company to do, an *ultra vires* act. Upon

this contention, even if it were vital here, it is enough to say that in determining whether a corporation is or is not a public utility, the important thing is not what its charter says it may do, but what it actually does. [Terminal Taxicab Co. v. Kutz, 241 U. S. 252.] In short, if the things done constitute the corporation a public service company, it ought not to be, and will not be, heard to urge its own wrongful aggressions in order to escape regulation. Moreover, the corporation is not a party to this proceeding. Complainant saw fit to concede, in electing to sue M. O. Danciger & Company, that the latter and not the brewery company constitutes the alleged public service entity, and that the explanation of Danciger, as to the relations between the brewery Company and M. O. Danciger & Company is true.

It is contended by appellants that the whole question is settled by sub-divisions 12 and 13 of Section 2 of the Public Service Commission Act, which define an "electric plant" and an "electric corporation," over which plants and aggregations, as defined, other appropriate provisions of this act (Subdivision 25, Sec. 2, p. 560, Laws 1913) confer plenary powers of regulation. The above clauses read thus:

"The term 'electric plant,' when used in this act, includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

"The term 'electrical corporation,' when used in this act, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely

for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others.”

While the definitions quoted, *supra*, express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words “for public use” are to be understood and to be read therein. [State ex rel. v. Spokane Co., 154 Pac. 1110.] For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation. [Munn v. Illinois, 94 U. S. 113.] Since, the sole right of regulation depends upon the public interest, the subdivisions quoted above, and which define an electric plant and an electric corporation, mean the same, whether the idea of a public use is expressly written therein or not; it is, nevertheless, of necessity connoted and to be understood therein. We are not to be understood as saying that an electric plant constructed solely for private use could not, by professing public service, become by such profession and by the furnishing of general public service, a public utility.

There is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company’s plant. For there is in the case neither existence nor assertion of the right of eminent domain. Nor does there exist any franchise or license, nor has there been obtained from the town of Weston any right or privilege to cross the streets, alleys, or other public places therein, nor are there any charter powers authorizing the company, or the respondent, to engage

in the public service. The fact of *professing public service*, that is, of holding himself or the Company out as ready and willing to serve the public, must therefore, in order to hold respondent, be deduced implicitly, if it is to be found in this record at all.

It is certainly fundamental that the business done by respondent either constitutes him a "public utility," or it does not. If he is a public utility, he is such within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act. If, therefore, what respondent did constitutes him a public utility, other apposite sections of the law confer upon the Commission the power of compelling him to furnish and provide such "instrumentalities and facilities as shall be safe and adequate to furnish service." [Sec. 68, p. 602, Laws 1913.] Still other provisions would seem to confer upon the Commission the power to compel service as to all residences, businesses and purposes, within a radius of three blocks from the Company's plant. Certainly so much could be compelled by orders of the Commission. Absent the matter of franchise, it is possible, we suggest *arguendo*, that plenary authority exists, if respondent be a public utility, to compel the furnishing of the service to the entire town of Weston. The plant is now running at its full capacity, and if any considerable extension of the service thereof were ordered, extensive and expensive additions of machinery to the plant must likewise be ordered. In order to afford such service to the whole town, or even to all persons within the three-block area, the respondent would be compelled to obtain from the town of Weston a franchise permitting him to erect poles and wires along and across the public streets and alleys thereof. In an analogous case we have said that the Commission cannot compel a public utility to do a thing wherein the obtaining of a franchise is a condition precedent. [State ex rel. v. Public Service Com., 270 Mo. 1. c. 442.]

In the light of these considerations does the business of respondent constitute him a public utility, within

the meaning of the Public Service Commission Act? We are of opinion that it does not. For as forecast above, State regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, *is not to be read into* the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.

The precise question before us is one of first impression in this jurisdiction. It has been up before the courts but few times in any jurisdiction. It has been up recently before the Public Service Commissions of the several States a number of times. The holding of the courts thereon, while not absolutely unanimous, has been usually against the contentions of the appellants here (Cawker v. Meyer, 147 Wis. 320; Del Mar Light & Power Co. v. Eshleman, 167 Cal. 666; State ex rel. v. Spokane Railroad Co., 154 Pac. 1110; Brown v. Gerald, 100 Me. 351; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429; Avery v. Vermont Electric Co., 75 Vt. 235; Fallsburg, Co. v. Alexander, 101 Va. 98; 1 Wyman on Public Service Corps, sec. 243), while a very few of the courts, *and the public service commissions rather unanimously*, have held to the contrary (Wingrove v. Public Service Commission, 74 W. Va. 190, and cases cited in 1918 A. L. R. A.). After a careful examination of the cases Mr. Wyman, in his excellent work on Public Service Corporations, at the section cited *supra*, says:

“That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general. But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor without being obliged to sell to all others. In the same way

the business of supplying electrical energy has generally been recognized as public in character. There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business."

In the late case of *Cawker v. Meyer*, *supra*, the Supreme Court of Wisconsin said:

"The State claims that by furnishing heat, light, and power to the tenants of their own building the plaintiffs became a public utility; that the furnishing of such commodities to any one else than to one's self is furnishing it to the public within the meaning of the statute. It is obvious that such a construction is too narrow, for it would constitute the owner of every building furnishing heat or light to tenants, as well as every householder who rents a heated or lighted room, a public utility. The Legislature never contemplated such a construction to be given the words 'public utility.' They must receive a construction that will effectuate the evident intent of the Legislature and not one that will lead to a manifest absurdity. It was not the furnishing of heat, light or power to tenants or, incidentally, to a few neighbors that the Legislature sought to regulate, but the furnishing of those commodities to the public, that is, to whoever might require the same. [*Wis. River Imp. Co. v. Pier*, 137 Wis. 325, 118 N. W. 857.]"

In the case of *Del Mar Water Light & Power Co. v. Eshleman*, *supra*, it was held that even a water company which was organized to furnish water to certain owners of town lots, which had been theretofore sold to such owners by a land company to which the Del Mar Company was an ancillary corporation, had the right to restrict its service to such lot owners, and to a few others of the public whose former water supply had been taken over by the Del Mar Company. Apposite to the facts and questions here it was said in the Del Mar case that:

“The serving of water to the 17 inhabitants of the ‘old town’ of Del Mar was not sufficient to make the water company a public utility, offering its water to the general public. When the land company bought all the unsold lots of the town site its property surrounded the places of residence of these inhabitants of ‘old town.’ It bought and abandoned the old wells from which these people derived their supply, and its arrangement with the water company to serve water to them no more constituted the latter a public service corporation than did that contract by which the Santa Fe Land Improvement Company was to receive a certain quantity of the water which might be developed. The sales to contractors who were engaged in road building were no more significant than would be similar accommodations by a farmer from his wells, and the same thing may be said of the trifling amounts of water sometimes sold to neighbors and by them hauled away in barrels. That the water company had refused to furnish persons who had not purchased land from the South Coast Land Company was shown without contradiction; and, while the reasons assigned were sometimes the scarcity of water, the fact of refusal remains. The fact is highly significant. It is also significant that under the arrangement which the water company had with the land company the latter was furnished with a large amount of water through unmetered pipes for the use of its hotel and other buildings. All of these facts and circumstances indicate that the Del Mar Water, Light & Power Company was merely the incorporated water department of the South Coast Land Company.”

The case of *State ex rel. v. Spokane Railroad Co.*, supra, which was decided by the Supreme Court of Washington, is practically on all-fours with the case at bar upon the ultimate facts. Not only is this true, but the definitions in our own Public Service Commission Act (and largely the act itself) were obviously taken, with mere slight verbal changes, from the prior Washington enactment on the same subject. [Laws of Wash. 1911, pp. 538-612.] Construing this act in 1916, in a case in-

volving, as here, the question whether the acts done constituted the actor therein a public utility within the purview of the Public Service Commission Law of that State, the Washington Supreme Court, in an able opinion by MOUNT, J., said:

“We understand the law in this State to be that companies furnishing electrical energy may or may not be public service corporations, depending upon the objects for which they were organized and the business in which they are engaged, the logic of the cases being that we will judicially inquire whether the sale of power is a selling to the public generally or is only an incident to the business in which the company is engaged . . .

The character of such companies and their relation to the public has been frequently considered by this court. We find no departure from our first holding that a sale of electrical energy or power for private enterprises is not an engaging in a public business and gives such companies no right to assert the sovereignty of the State. [Citing authorities.] . . .

“It is argued that the present act (1911) furnishes ample authority for holding that public necessity, as evidenced by the legislative declaration, now requires that such companies be held subject to regulation in their private affairs, and that the right of the public to the enjoyment and use of such property is regulated, guaranteed, and safeguarded by appropriate legislation. But we think the act does not go so far . . . Granting for the sake of argument the right of the Legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle

that Noble State Bank v. Haskell, 219 U. S. 104, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, and German Alliance Insurance Co. v. Kansas, 233 U. S. 389, 58 L. Ed. 1011, L. R. A. 1915C, 1189, rest. Until the Legislature brings a business within the police power by clear intent, courts will not do so. . . .

“Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant’s contracts with those to whom it sells its surplus are of any interest or concern to anyone other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant it can sell at one price to one man and at another price to another. . . . If either is not content with the offering of the other he does not have to contract. He can go his way. But it is not so with appellant, when exercising its public function, that is, furnishing something—a necessity—that all are entitled to receive upon equal terms, under equal circumstances and without exclusive conditions. [Beale & Wyman, Rate Regulation, sec. 1.]”

The case of Van Dyke v. Geary, 244 U. S. 39, is strongly relied on by appellants as upholding their contentions. We do not regard it as doing so, and we have no quarrel with the law announced, upon the facts existing in that case. The facts, which in our view differentiate that case from this one, are at page 48 thus stated by the court in the opinion: “Counsel contend that the use is not public, because water is furnished only to particular individuals in fulfillment of private contracts made with the purchasers of town-site lots. *But there is nothing in the record to indicate that such is the fact.*” (Italics our).

The rule by which profession of public employment is to be tested, where, as here, such profession arises, if at all, implicitly, is thus laid down by Mr. Wyman:

St. Louis v. Allen.

“The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron ALDERSON said in the leading case: ‘Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract.’ This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. ‘One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.’” [1 Wyman On Pub. Service Corps., 227.]

Testing the facts of the instant case by this rule, and by the rule announced by the majority of the courts, as well as by the reason of the thing, and the far-reaching results of any other view, rather than by the view taken by a majority of the Public Service Commissions of the several states, we are constrained to hold that as to complainant, the respondent owed him no continuing public duty of service, and that the view taken *nisi* is correct.

It follows that the case ought to be affirmed. Let this be done. All concur.

CITY OF ST. LOUIS v. HUGH ALLEN, Appellant.

Division Two, July 16, 1918.

1. **ORDINANCE: Arbitrary Will of Officer.** Neither the Legislature nor the city can commit to the unrestrained will of a single officer the power arbitrarily to favor one individual in the use of streets and to deny such favor to others.
2. ———: ———: **Drivers: Obedience to Direction of Police.** An ordinance declaring that “drivers must at all times comply with

any direction by voice or hand of any member of the police force, as to stopping, starting, approaching or departing from any place" puts the citizen in the arbitrary power of the police officer regardless of the circumstances of the case, is subject to the objection that it deprives persons of equal protection of the laws, and is invalid; and however meritorious may be the city's case against an offender, he cannot be convicted of its violation.

3. ———: ———: **Entrance to Building.** A large eight-story office building fronting on a busy street must have an entrance from the street, as well as from the sidewalk; and a proper place marked off between posts and placarded with a sign warning all persons not to stand their vehicles between the posts, is a reasonable regulation; but an ordinance making the use of such placarded entrance dependent upon the direction of a policeman, is invalid.

Appeal from St. Louis Court of Criminal Correction.—
Hon. Benjamin F. Clark, Judge.

REVERSED.

Leahy, Sanders & Barth for appellant.

(1) An automobile has, subject to valid statutory regulations, the same rights on the streets of a city as any other vehicle. 2 Elliott on Roads and Streets (3 Ed.), sec. 1107, p. 647; 2 Dillon on Municipal Corporations (5 Ed.), sec. 714, p. 1086; State v. Swagerty, 203 Mo. 522; Hall v. Compton, 130 Mo. App. 679; Daily v. Maxwell, 152 Mo. App. 423. (2) The easement acquired by the public in the streets of a city is intended, *inter alia*, for purposes of travel and transportation and as a means of communication with all the incidental rights which accompany these purposes. 3 Dillon on Municipal Corporations (5 Ed.), sec. 1211, p. 1907. (3) Travelers, whether on foot or in vehicles, have a right to stop along the ways, roads or streets, for a reasonable time, for their own convenience in the ordinary course of business or social life; and they do not thereby lose their rights as travelers to the protection of constitutional guaranties to person and property. 2 Elliott

on Roads and Streets (3 Ed.), sec. 1100, p. 640; *Smet-hurst v. Independent Church*, 148 Mass. 266; *Odom v. Schmidt*, 52 La. Ann. 2131; *Lacy v. Winn*, 3 Pa. Dist. 811; *Mark v. Fritschy*, 195 N. Y. 283. (4) The ordinance (Sections 1351 and 1357) provides that drivers of vehicles in said city must at all times comply with any direction of any member of the police force, as to stopping or starting a vehicle, or approaching or departing from any place; or as to the manner of receiving or discharging passengers or freight in any place; makes a violation a misdemeanor punishable by a fine of not over one hundred dollars. It therefore attempts to confer upon the police officer the power to make traffic rules and regulations, and is void because a delegation of legislative power. *Seibel-Suessdorf Co. v. Manufacturers Ry. Co.*, 230 Mo. 82; *City of St. Louis v. Howard*, 119 Mo. 47; *State v. Thompson*, 160 Mo. 343. (5) As an agency of the State the city of St. Louis has the power to reasonably regulate the use of its streets by vehicles and pedestrians, by proper legislative action, but the city neither has, nor could the Legislature confer upon it, the right to delegate to its police officers the unlimited and unregulated power to improvise, make or declare, rules and regulations governing the use of its streets by owners or drivers of vehicles, or pedestrians, because such delegation of power violates the fundamental principle that reasonable regulation is governed by or subject to rules or restrictions duly promulgated and certain in character, and is, in effect, a grant of despotic power. 2 *Dillon on Municipal Corporations* (5 Ed.), sec. 665, 1002; *City of St. Louis v. Heitzeberg Packing & Provision Co.*, 141 Mo. 388; *Elkhart v. Murray*, 165 Ind. 307; *Hays v. Poplar Bluff*, 263 Mo. 516; *Commonwealth v. Roy*, 140 Mass. 433; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 27. (6) These ordinance provisions, Sections 1351 and 1357, are in conflict with Sections 4 and 30 of Article 2 of the Constitution of Missouri and the Fourteenth Amendment of the Constitution of the United States, because the liberty and property of the citizen are thereby

subjected to deprivation and loss in an arbitrary manner, without notice, by arrest and fine, and are not due process, and deny the equal protection of the laws. Freund on Police Power (1 Ed.), sec. 611,, 633; Clark v. Mitchell, 64 Mo. 579; State v. Loomis, 115 Mo. 313.

Charles H. Daues and *H. A. Hamilton*, for respondent.

(1) The city of St. Louis has authority to regulate the traffic upon its streets. (2) Section 1351, Revised Code of St. Louis 1912, requires drivers of vehicles to obey the direction of police officers in the use of the city streets. This is not a delegation of legislative authority, and traffic in congested sections cannot be regulated except by the constant oversight and supervision of the traffic officer.

ROY, C.—Appellant was tried and fined in the police court of St. Louis. He appealed to the Court of Criminal Correction and met the same fate. He has appealed to this court, a constitutional question being involved.

The complaint, omitting formal parts, is as follows:

“Hugh Allen to the City of St. Louis, Dr.

“To one hundred dollars for the violation of an ordinance of said city, entitled, ‘An Ordinance in Revision of the General Ordinances of the City of St. Louis,’ being ordinance No. 26653, sections 1351, 1357, 1358, approved November 9, 1912.

“In this, to wit: In the city of St. Louis and State of Missouri, on the 9th day of July, 1916, the said Hugh Allen did then and there drive a vehicle over and upon the streets of said city and did fail to comply with the direction by voice or hand of a member of the police force as to stopping, starting, approaching or departing from any place, to-wit, in front of Metropolitan Building, Grand Avenue and Olive Street, contrary to the ordinance in such cases made and provided.”

Section 1358 of the ordinance has no application to the case. The other two sections mentioned in that complaint are as follows:

"Sec. 1351. Drivers must at all times comply with any direction by voice or hand, of any member of the police force, as to stopping, starting, approaching or departing from any place; the manner of taking up or setting down passengers or loading or unloading goods in any place.

"Sec. 1357. Any person violating any of the foregoing provisions, rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars."

In the Court of Criminal Correction and previous to the trial there, the defendant moved to quash the complaint on the ground that it did not state facts sufficient to constitute an offense under the ordinances of the city and because said Section 1351 of the ordinance is contrary to the Fourteenth Amendment to the Constitution of the United States, in that it deprives the defendant of his liberty and property without due process of law, and deprives him of the equal protection of the law. The motion was overruled.

The affair out of which this prosecution arose occurred on Grand Avenue in front of the Metropolitan Building, which fronts west on that avenue about 150 feet, and south on Olive Street about the same distance. It is an eight-story office building, almost entirely occupied by professional men. About the middle of the west front at the curb are two posts twenty-three feet apart, on each of which is the sign, "Don't stand between these posts." The defendant was the chauffeur of Mr. Leahy, one of his counsel in this case. On July 9, 1915, near four o'clock in the afternoon, the defendant drove his car to said entrance. The wife of his employer was in the car on her way to the office of her dentist in that building. The defendant backed his car so that the rear thereof was near the south post, and most of the car was in front of the entrance at an angle of about forty-five degrees. Backed

against the north post was an express wagon extending directly into the street, and to some extent in front of the entrance, engaged in receiving and delivering packages. Cars were parked closely on both sides of the street at that point for a distance not definitely shown here. Nat-B. Clark, the traffic officer at that point, testified that, after defendant had occupied that position fifteen or twenty minutes, the elevator starter in the Metropolitan Building asked him to make defendant move his car from the entrance. The officer testified:

"I went out and said: 'You will have to move your machine from the building here, you can't block this entrance.' He said: 'Where will I go?' I said: 'I don't know where you will go, but you will have to move,' and he said: 'Where will I park this car?' I said: 'You may have to go up to Washington or down on Lindell, but you can't stop here.' He said: 'Huh, the madam was in the building and I will stay here until she comes down,' and I immediately placed him under arrest."

The elevator boy testified that after defendant had been there fifteen or twenty minutes, he (witness) asked defendant to move, and that defendant said there was no other place to go, and that witness asked the officer to compel defendant to move.

The defendant on the stand said that after he had been there about fifteen or twenty minutes, the elevator boy asked him to move, and that he (witness) told the boy to make the express wagons move then he would move, and that he told the officer the same thing. The arrest followed.

A building such as the Metropolitan must have an entrance from the street as well as from the sidewalk. It must have a mouth as all live creatures must have. That mouth must, as far as practically possible, be kept open and unobstructed. In this case twenty-three feet along the curb at the entrance was marked off between posts, and the placards on those posts warned all persons not to stand there. That space was an entrance, but not a place for parking vehicles.

**Special
Privilege.**

The express wagon was using a small part of it, not as standing ground, but for its entrance purposes. So far as appears, every one but the defendant respected the rights of other people in respect to that entrance. The defendant appeared on the scene and claimed a right which no one else claimed or received, the right to stop at that entrance in spite of the remonstrance of its spokesman, the elevator boy, and in spite of the police. It is as if he should say: "It is so nice for the owners of this building, the city authorities and all other persons to leave and keep this entrance open, leaving me as the only one entitled to close it and hold it *ad libitum*. I claim the special privilege under the Constitution which guarantees to me the *equal protection* of the laws! I even claim the right to tell the police to move other people and then come to me."

However meritorious the city's rights may be if properly presented, the ordinance relied on by the city in its complaint is invalid.

In *Mayor of Baltimore v. Radecke*, 49 Md. 217, the city ordinance provided that no one should erect a steam engine without the previous sanction of the mayor and council, and that any such engine so erected should be removed within six months after such permit should be revoked and notice given by the mayor. It was there held that the city by ordinance could prescribe regulations for the use of steam engines, but that it could not commit to the unrestrained will of a single officer the power arbitrarily to favor one individual in that respect and to impose his will on another. It was there said: "In fact, an ordinance which clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

That case is cited with approval in 1 Dillon on Mu. Cor. (5 Ed.), sec. 321.

In *Richmond v. Dudley*, 129 Ind. 112, it was held that city ordinances must specify rules and conditions to be observed in the conduct of business, and must allow all

citizens the same privileges under those rules, and must not empower an officer to arbitrarily discriminate between individuals in that respect. That case is cited with approval in *City of Elkhart v. Murray*, 165 Ind. 304. That rule is affirmed in *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, and the long list of cases there cited.

In *Hays v. Poplar Bluff*, 263 Mo. 516, it was held by Court in Banc that though a city can prescribe "fire limits," yet it has no power to ordain that no building shall be constructed of the proscribed materials without the permission of the mayor and council, and that such permission shall not be given without the written consent of all persons holding property in the block. It was there said that in such matters the ordinance must make rules applicable to all alike, and that such matters cannot be left to the arbitrary will of any one. That case cites with approval the Indiana cases above mentioned.

The ordinance here involved puts the citizen in the arbitrary power of the officer regardless of the circumstances of the case. Its invalidity is so glaring that the respondent has not cited any authority to uphold it. In *Bessonies v. City of Indianapolis*, 71 Ind. 189, and in *City of Elkhart v. Murray*, 165 Ind. 304, *supra*, it was held that such ordinances are violative of the constitutional provision which guarantees the equal protection of the laws. It was there said that what the Legislature cannot do, it cannot authorize a municipal corporation to do.

In our opinion the ordinance in question is subject to the objection that it may deprive persons of the equal protection of the laws, and that, though the city may have a most meritorious case, it cannot be based on that invalid ordinance.

The judgment is reversed. *White, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court. All of the judges concur.

THE STATE ex rel. JOHN MILLS, Collector of City
of Aurora, v. KATHARYN FLEMING et al., Ap-
pellants.

Division Two, July 16, 1918.

1. **TAXATION: Lots Leased for Military Purposes: Exception.** The statute (Sec. 8378, R. S. 1909) providing that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease and use" contains no exception, and if it is not in conflict with the constitutional provision which exempts property "of the State" and declares that all laws exempting property other than that enumerated shall be void, property leased for the National Guard is not subject to taxation, whether it is used exclusively for such purpose or not.
2. ———: ———: **Exception as to Exclusive Use.** The decisions which hold that property is not exempt from taxation unless used "exclusively" for educational, charitable or religious purposes, are not controlling in determining whether buildings leased by the State for military purposes shall be exempt, because they interpret a statute requiring such "exclusive use," whereas the statute concerning the leasing of property for military purposes contains no such provision.
3. ———: ———: **Buildings Mean Lots.** The evident intention of the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease or use" was that the lot upon which the buildings are situated should be exempt.
4. ———: ———: **Constitutionality of Statute: Not Decided.** Where in the suit for taxes the defendant pleaded that the lots were exempted by the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes," and the plaintiff did not plead that such statute is unconstitutional, the court is not called upon to rule that such statute is violative of the provision of the Constitution which exempts property "of the State" and certain other property enumerated and declares that all laws exempting property other than that enumerated shall be void.
5. ———: **Premature Suit.** A suit filed in December, 1913, for the taxes assessed in 1912, which were payable in 1913, is premature, because the taxes were not delinquent until January, 1914.

State ex rel. v. Fleming.

Appeal from Lawrence Circuit Court.—*Hon. Carr McNatt*, Judge.

REVERSED AND REMANDED.

John L. McNatt for appellant.

(1) The taxes for 1912 were not subject to suit until the first day of January, 1914. Therefore this suit brought on the eighth day of December, 1913, was premature, and the admission in evidence of the tax bill containing such tax was error. R. S. 1909, sec. 11491; State ex rel. Hudson v. Carr, 178 Mo. 229. (2) All Armories owned by the State and all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such ownership, lease or use. Therefore the testimony that this property was partially used for other purposes was incompetent as a defense, and an attempt to read into the statute something not intended by the Legislature. R. S. 1909, sec. 8378.

H. H. Bloss for respondent.

(1) The statutes relating to the bringing of suits is not the same where the party defendants are residents or non-residents. In cases of non-residents the Statute provides that where service can be had on them the plaintiff is not required to wait one year after the tax becomes delinquent. R. S. 1909, sec. 11506. (2) Exemption from taxation must be in terms too plain to be mistaken, and should be confined to the strict terms of the law granting it. Pacific Railroad Co. v. Cass County, 53 Mo. 17; State ex rel. v. Railroad Co., 89 Mo. 523; State ex rel. v. Railroad Co., 99 Mo. 30; State ex rel. v. Arnold, 136 Mo. 446. (3) Where a statute exempts a building from taxation because of its use for some purpose which the State does not desire to tax and exempts because of that reason by such statute and the Constitution, then the building must be exclusively used

for that purpose, and where the owners derive a benefit from other businesses through the property, the same is not exempt. *North St. Louis Gymnastic Society v. Hudson*, 12 Mo. App. 342, 85 Mo. 32; *State ex rel. v. McGurn*, 187 Mo. 238; *Fitterer v. Crawford*, 157 Mo. 41. (4) Exemptions being in derogation of equal rights are not to be favored by the courts. *State ex rel. v. Johnson*, 214 Mo. 656.

WHITE, C.—The suit is brought by the collector for the city of Aurora to recover taxes for the years 1907 to 1912 inclusive, charged against Lot 7, Block 6, of the original survey of the city of Aurora. The circuit court rendered judgment for plaintiff for all taxes except for the year 1907.

The answer, among other things, pleads that the lot described in the petition was leased and rented to the State of Missouri for military purposes and was used by the National Guard of the State of Missouri. The reply of the respondent contains a general denial, and other matters which are not set out in the abstract.

On the trial, after the plaintiff introduced the tax-bill and rested, the defendant introduced Colonel W. A. Raupp, Colonel of the Second Regiment of the National Guard of Missouri. He testified that Company G of the Second Regiment, part of the time under a verbal lease and part of the time under a written one, had used the building on the premises as an armory all the time during the years for which the taxes sued for were assessed, excepting a short period of a few months; that fifty dollars a month was paid for the use of the building for the military band and Company G.

An accurate description of the building does not appear in the record. Enough is shown to indicate that there was a basement, a main floor called the "Auditorium" on the ground floor, and rooms occupying part of the space upstairs; whether the second floor covered all the space or not is not shown. Once a week at night the Company used the main room, called the auditorium, for the purpose of drill, and also at such other times as they

desired to use it for the purpose of inspection; the Company was inspected by a Government official at irregular intervals. The military band also occupied portions of the building. During part of the period the basement was used for an arsenal, and the guns were stored there; during all the period it was used for the purpose of bath and toilet by men of the Company. The janitor of the building had rooms upstairs and some of the offices were used by the Company.

Colonel Raupp testified that a couple of rooms were cut out down-stairs for offices and used by someone else, and possibly two rooms upstairs. It was also shown that there were billiard tables in the basement, but whether they were used by the Company, in connection with the military occupation, or by other tenants was not shown. At times some part of the building "was made into a theatre and used for a skating rink." That appears to be the room used by the Company for its drills. Whether this use was merely permissive by the military authorities in charge, or whether there were other tenants that had exclusive use of the Auditorium at certain periods, is not shown. The evidence is very indefinite as to the extent of the use of the building, but the military band and Company G had access to practically all parts of it. There was no definite restriction of their right either as to the time of use or parts to be occupied. No evidence appears as to whether anybody paid rent to the owners for the use of any part of the building other than that paid by the military organization. But it seems the military authorities paid a reduced rent on account of the supposed exemption of the building from taxation.

The statute under which the defendants claim exemption from taxes is as follows:

Section 8378, Revised Statutes, 1909: "All armories owned by this State or by any organization of the National Guard, and all buildings leased by the State for military purposes, shall be exempt from taxation for all purposes during the period of such ownership, lease and use."

The respondent cites several cases showing that certain property claimed as exempt from taxation must be "exclusively used" for the purpose for which the statute creates the exemption. [State ex rel. v. Johnson, 214 Mo. 656; Fitterer v. Crawford, 157 Mo. 51; N. St. L. Gymnastic Soc. v. Hundson, 12 Mo. App. 342.] These cases, and many others of like character, construe Section 11335, Revised Statutes, 1909. That section creates exemption from taxation for certain kinds of property, and among them real estate and buildings thereon, which "are used exclusively" for religious worship, schools or charitable purposes. In all cases where property is claimed to be exempt on the ground that it is used for such purposes the exemption is not allowed if a part of the premises is used for commercial purposes. For instance, a building used for a Young Men's Christian Association, where a portion of the ground floor of the building was rented for stores was not exempt. [State ex rel. v. Y. M. C. A., 259 Mo. 233.] In a case where the premises owned by the Order of Elks, a charitable organization, were used for dancing and social parties where meals and refreshments, including liquors, were served to the members and guests, it was held subject to taxation because not exclusively used for the charitable purposes of the order. [B. P. O. E. v. Koeln, 262 Mo. 444.]

Such cases are not controlling, because they interpret an entirely different statute from the one under consideration here. The "exclusive use" provided for in the section mentioned and its absence in the statute relating to armories, indicates a clear intention of the lawmakers to have a different test applied. Section 8378 quoted above provides that "all buildings *leased* by the State for military purposes shall be exempt from taxation for all purposes during the period of such . . . lease and use." No exception is provided in case the building may also be used for other purposes during the period. The exemption applies in every case where the building is so leased and used.

There is no provision in the taxation laws for separation of a building from the ground for taxation purposes; when the building is exempt from taxation it necessarily exempts the ground upon which it is situated; evidently that was the intention.

The reply of the plaintiff is not set out in full, and if the constitutionality of Section 8378 is raised in the pleading it does not appear from the abstract of the record, though it could have been so raised, because the answer pleads a defense under that section. From the argument presented in the briefs it appears that it was not so raised. Therefore, we are not called upon to decide whether that part of that section which provides that armories "leased by the State for military purposes" is constitutional, under Section 6 of Article 10 of the Constitution which exempts property "*of the State*," with other property enumerated, and Section 7 of that article which provides that all laws exempting property other than that enumerated "shall be void."

The suit was filed December 8, 1913. In that case the taxes assessed for the year 1912, which were payable in 1913, were not delinquent until January, 1914, and the suit was premature in any case as to that part of the bill.

The judgment is reversed and the cause remanded. *Roy C.*, concurs.

PER CURIAM—The foregoing opinion by *WHITE, C.*, is adopted as the opinion of the court. All of the judges concur.

In Matter of Petition of W. W. CRITZER et al. For Public Road.

Division Two, July 16, 1918.

1. **PUBLIC ROAD: Evidence: Transcript of County Court Record.** In the trial in the circuit court of a proceeding to establish a public road, where the issue as to damages is not being tried, but the only issue is the one of the public necessity of the proposed road, certified copies of the roll and record of the proceedings in the county court are proper evidence.

2. ———: **Necessity: Established Cross Road.** The existence or non-existence of a parallel road one half mile distant from the proposed road, and whether it has been established by dedication or general use, or has a definite location, it not conclusive of the public necessity of the proposed road. Under the statute (Sec. 10437, R. S. 1909) the public necessity of a proposed road does not depend upon a showing that no other possible egress or ingress for the public use exists.
3. ———: ———: **Conflicting Evidence.** A proceeding to establish a public road is an action at law, and if the evidence on the question of its public necessity is conflicting and there is ample evidence to justify the court's finding that there is a public necessity for the road, the Supreme Court will not interfere with the finding.
4. ———: **Notices: Certified Copy of Affidavit.** An objection that a certified copy of the affidavit filed in the county court showing proper posting of notices of the intended application for the establishment of a proposed public road is not the best evidence and should not have been admitted in evidence in the trial on appeal in the circuit court until the loss of the original was accounted for, made for the first time in the Supreme Court, will not be ruled.
5. ———: **Damages: Jury Trial: After Appeal.** Upon an appeal from the judgment of the county court "in ordering the establishment of a public road," the appellants are not entitled to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land, or to have the question of damages considered at all. An appeal from the judgment of the county court opening or establishing the road, and from that order alone, does not give the circuit court jurisdiction to try *de novo* the question of damages adjudged by separate judgments in the county court.
6. ———: ———: **No Request for Jury Trial.** If appellants made no attempt in the circuit court to have a retrial of the question of damages, they cannot be heard to complain in the Supreme Court that they were denied a jury trial on that question.

Appeal from Lawrence Circuit Court.—*Hon. Carr McNatt*, Judge.

AFFIRMED.

M. S. Ginn, William B. Skinner and Robert Stemmons for appellants.

(1) It was an error to permit to be read in evidence the roll and record of the entire proceedings of the cause in the county court. *Railroad v. Pfau*, 212 Mo. 407; *Railroad v. Roberts*, 187 Mo. 407. (2) It is not necessary that a public road be established by an order of the county court, nor is it necessary that public money be expended upon it, but a public road may exist by dedication and acceptance by the public, which may be implied by long user by the public. *State v. Muir*, 136 Mo. App. 118; *Rector v. Hart*, 8 Mo. 323; *Benton v. City of St. Louis*, 217 Mo. 687. (3) The county court had no initial jurisdiction to establish a new public road, when the requisite notice had not been given. Unless the notice had been given according to the statute, the circuit court had no appellate jurisdiction to try the case *de novo*. The copy of the affidavit as to the posting of the notices was not admissible in evidence in the absence of evidence accounting for the original affidavit. The testimony of petitioners witness shows that the notice was not given according to the statute. Sec. 10436, R. S. 1909; *Daugherty v. Brown*, 91 Mo. 26; *Ellis v. Railroad*, 51 Mo. 200; *Jefferson County v. Cowan*, 54 Mo. 234; *Whitely v. Platte County*, 73 Mo. 615. (4) The appeal in this case transferred the entire cause to the circuit court for trial *de novo*, and the judgment should have settled all the rights of the parties. The appeal presented two issues to be tried anew in the circuit court, namely, the public necessity of the road in question, and the measure of the damages or the amount of compensation to the landowners whose land was appropriated for a public use. The exceptors were entitled to a trial by a jury upon the issue of the measure of damages, and it was just as essential for the court to accord them that right and award them damages as it was to find the road to be a public necessity. Sec. 10440, R. S. 1909; Sec. 21, Art. 2, Mo. Constitution; *In re Petition of Gardner*, 41 Mo. App. 593; *Colville v. Judy*, 73 Mo. 653; *Mayes v. Palmer*, 206 Mo. 293.

James A. Sater and John L. McNatt for respondent.

(1) It was not error to call the trial judge's attention to the roll and record in this case, as the question of the amount of damages to the remonstrators was not before the court. Certified copies of records are admissible in evidence. R. S. 1909, secs. 6331, 10438. (2) Appellants objected to petitioners showing anything other than the affidavit as to the posting of notices, which was done and not disputed by appellants and was taken as true by the court. A litigant cannot assume inconsistent positions, in the Appellate Court from that taken in the trial court. *Paul v. Western Union*, 164 Mo. 241; R. S. 1909, sec. 10436. (3) The affidavit for appeal did not bring before the circuit court a reconsideration of the award for damages. R. S. 1909, sec. 10440; *Bennett v. Woody*, 137 Mo. 377.

WILLIAMS, J.—This proceeding, originally instituted in the county court of Lawrence County, seeks to establish a new road one-half mile in length along the north half of a line running north and south through the center of Section 9, Township 29, Range 27, Lawrence County, Missouri. The proposed road is an extension of a north-and-south road coming down from the north, and will also connect two parallel roads running east and west, one along the north and the other along the center line of said Section 9.

A remonstrance was properly filed, attacking the public necessity of the proposed road. The matter proceeded in the regular way in the county court, resulting in a judgment finding the proposed road was a public necessity and ordering the same established. Three persons whose lands were taken by the new road filed exception to the commissioners' report on damages, and a trial was had before a jury in the county court, which resulted in a separate judgment re-assessing the damages.

The remonstrators filed in the county court the following affidavit for appeal to the circuit court (caption and signatures omitted):

"Before the clerk of the Lawrence County Court, of Lawrence County, Missouri, M. S. Ginn, attorney for defendants, being duly sworn, upon his oath says, that he is attorney for the defendants and that their application for appeal is not made for vexation or delay, but because they believe the appellants to be injured by the judgment of the Lawrence County Court, *in ordering the establishment of a public road* in the north half of Section Nine, Township Twenty-nine of Range Twenty-seven in Lawrence County, Missouri." (Italics ours).

The county court made an order granting an appeal to the circuit court.

The question as to the public necessity of the proposed road was tried *de novo* in the circuit court. Upon the trial in the circuit court the petitioners offered substantial evidence tending to prove that the proposed road was a public necessity. On the other hand the remonstrators offered evidence tending to show that the proposed road was not a public necessity. After hearing the evidence the circuit court entered judgment finding that the proposed road was a "public necessity and practical," that all necessary steps required by law had been properly taken by the petitioners, and ordered that the proposed road be established.

Thereupon the remonstrators duly perfected an appeal to this court.

Any additional facts found to be necessary to an understanding of the points raised will be mentioned in the course of the opinion.

I. Appellants first contend that the circuit court erred in admitting the certified copies of the roll and record of the entire proceedings in this cause
Evidence. in the county court in evidence.

At the time the above documents were offered in evidence it does not appear that appellants made any objection thereto. Furthermore, even though objection had been properly made, we are unable to see wherein this constituted error in the present case. The certified copies of documents offered in evidence were contained

in the transcript of the case on appeal from the county court to the circuit court, properly certified to by the county clerk. All portions relating to jurisdictional matters, such as the pleadings, etc., properly contained in the transcript, were proper matters for the court's consideration, and it was not even necessary that they be formally offered in evidence. So far as the trial in the circuit court was concerned the transcript of such matters took the place of original pleadings, etc.,

The case of *Railroad v. Pfau*, 212 Mo. 398, relied upon by appellant, has no application to the present case. In that case it was held erroneous to read the commissioners' report or award of damages in a condemnation case to the jury empaneled to try the same issue of damages upon exceptions to the commissioners' report.

In the present case, the issue as to damages was not being tried before the circuit court, and that being true those portions of the admitted transcript showing the amount of damages reported by the commissioners in the county court could in no manner have operated to appellants' prejudice upon the trial of the issue before the court as to the public necessity for the proposed road. We therefore rule this point against appellants.

II. The second assignment of error is as follows: "The court erred in finding that the road between Sections Nine and Ten was not established by dedication and in finding that the road in controversy was a public necessity."

**Public
Necessity.**

There was evidence tending to show that for many years the public had been using, as a road, a way running north and south between Sections Nine and Ten, one-half mile east of the proposed road. There was likewise testimony tending to show that said road had no definite location—that it ran over rough and hilly unfenced land—the exact point of passage being determined more by the condition of the ground or weather than by any fixed or definite boundary of the road. There was evidence to the effect that some of these appellants shortly before or at about the same time this proceeding was instituted

made unsuccessfull attempts to have the county court *establish* a road at the very point where they now say there had been a road for many years. There was some evidence to the effect that it was such a road as to answer the needs of the public in that vicinity. On the other hand, there was testimony that it was impossible to haul loads over the same, because of the hills and unimproved condition of the indefinite roadway, and that no public money had ever been expended on said road.

Of course the only purpose of the evidence concerning the above road was to throw some light upon the question of the public necessity of the proposed road.

The existence or non-existence of a road at the above place would not be conclusive one way or the other as to the public necessity of a proposed road at another place. We think the existence of the "public necessity" of a proposed new road (as that term is used in Sec. 10437, R. S. 1909) does not depend upon a showing being made that no other *possible* ingress or egress for the public existed. Certainly the condition, location, and the inconvenience of the existing routes and the added conveniences to the public arising from a new route are elements (among others) to be considered. The evidence tends to show that the proposed road (which before the trial in the circuit court had become opened for travel) runs over level ground, that it supplies a much better route for heavy hauling, as well as traveling by buggies or automobiles, and that the new road is used by many people in going to and from the town of Miller, their trading point.

This is an action at law. The evidence upon the question of public necessity was conflicting. There was ample evidence to support the court's finding that the proposed road was justifiable on the ground of public necessity. Under such circumstances this court cannot interfere with the finding of facts so made.

III. It is next contended that the court erred in admitting in evidence a certified copy of an affidavit filed

Notices. in the county court showing proper posting of notices of the intended application for the establishment of the proposed road.

It is now contended in this behalf that the certified copy was not the best evidence and that the loss of the original should have been established before the copy was competent.

Concerning this point it is only necessary to say that the above objection was made for the first time in this court. It is therefore unnecessary to determine what would have been the result had the objection been timely made upon the trial.

IV. Appellants' next and last assignment of error is as follows:—

Jury Trial. "The court erred in denying the remonstrators and exceptors the right to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land for a public road and in taking private property for a public use without first awarding just compensation therefor."

This assignment is without merit. No appeal was taken by appellants from the judgment of the county court assessing damages. The judgment of the county court appealed from was the judgment opening or establishing the new road (see affidavit for appeal in the foregoing statement).

Section 10440, Revised Statutes 1909, provides for an appeal in such cases "from the judgment of the county court assessing damages, or for opening, changing or vacating any road."

The appeal from the judgment of the county court opening or establishing the road did not give the circuit court jurisdiction to try *de novo* the question of damages which were adjudged by a separate judgment of the county court. [See *Bennett v. Woody*, 137 Mo. 377, 1 c. 380; *Howell v. Jackson County*, 262 Mo. 403, 1 c. 415 et. seq.]

Appellants' present contention must have been an afterthought. The record does not show any attempt on their part to have a re-trial in the circuit court of the question of damages. That, in and of itself, would also be sufficient reason for disallowing the above assignment of error.

The judgment is affirmed. All concur.

THE STATE ex inf. FRANK W. McALLISTER,
Attorney-General, v. CONSOLIDATED SCHOOL
DISTRICT NO. 2 OF PLATTE COUNTY, Appel-
lants.

In Banc, July 19, 1918.

1. **CONSOLIDATED SCHOOL DISTRICT: Valid Statute.** Section 10776, Revised Statutes 1909, is a valid enactment and applicable to "school districts that may be hereafter organized under the laws of this State," and is therefore applicable to a consolidated school district organized in pursuance to a subsequent statute.
2. ———: **Forfeiture of Franchise: Failure to Maintain Eight Months' School.** Section 10776, Revised Statutes 1909, declaring that "whenever any school district . . . shall fail or refuse, for a period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body," was only intended to affix a forfeiture for failure to provide an eight months' school when such omission did not result from inability to have so long a term, or where the failure was purposeful or intentional on the part of the school district. It has no application to a consolidated school district to which, during the pendency of litigation in which the validity of its organization is drawn in question, the county officers refuse to credit or pay the school taxes, and which because of those facts is unable to conduct a school, but nevertheless in entire good faith endeavors, as far as possible, to exercise its corporate franchise.
3. ———: ———: **Failure to Maintain Elementary Schools.** The terms of Section 4 of the Act of 1913 (Laws 1913, p. 723), mak-

State ex inf. v. School District.

ing it the duty of a consolidated school district to maintain an elementary school within a named distance of pupils, in case no transportation is provided for, do not condition an automatic forfeiture of the district's corporate franchise upon its non-observance, and the courts will not make a failure to observe its requirements a ground of forfeiture. [Criticizing State ex rel. v. School District, 195 Mo. App. 507.]

Appeal from Platte Circuit Court.—*Hon. Alonzo D. Burnes*, Judge.

REVERSED AND REMANDED (*with directions*).

N. B. Anderson, Guy B. Park, and Irwin & Haley for appellant.

(1) The law abhors forfeitures, and never declares one except upon the ground of absolute necessity. *McFarland v. Accident Assn.*, 124 Mo. 204; *Stout v. Mo. Fidelity & Casualty Co.*, 179 S. W. 993. (2) The provisions of Sec. 10776, R. S. 1909, which relators here seek to revoke, were never intended to apply, except in a case of a wilful refusal of the district to maintain an eight months' school, providing the same could be done by a levy of forty cents on the one hundred dollar valuation, together with the public funds and cash on hand, and the statute should be given a construction with the law relating to forfeitures. (3) Relators will not be heard to complain of the default of the officers of the consolidated district caused by their own intentional and unlawful interference.

Frank W. McAllister, Attorney-General, *James H. Hull* and *George W. Day* of counsel.

(1) The consolidated district organization lapsed when it failed to establish and maintain a high school, as provided by Laws 1913, 721. *State ex inf. v. Consolidated School District*, 195 Mo. App. 507. (2) Consolidated District No. 2 forfeited its rights and privileges as a school district, by failing, for the period of one year, to provide an eight months' school in such year, when a levy of forty cents on the one hundred dollars'

valuation, together with the public funds and cash on hands, enabled it to have so long a term. R. S. 1909, sec. 10776; State ex rel. v. Claxton, 263 Mo. 701. (3) Consolidated District No. 2 lost its corporate rights as a school district, by failing to conduct a school of any kind in all of the original school districts comprising it, and in failing to maintain an elementary school within two and one-half miles by the nearest traveled road of the home of every child of school age within said district, there being no transportation provided therein. Laws 1913, p. 723, sec. 4; State ex inf. v. Consolidated School District, 195 Mo. App. 507.

BOND, C. J.— I. In the spring of 1914, Consolidated School District No. 2 of Platte County, Missouri, was duly organized over a territory theretofore embracing several school districts. These, with a few exceptions, denied the validity of the consolidation and attempted to act independently. Thereupon the Attorney-General filed proceedings in the nature of a *quo warranto* to oust the directors of one of the former school districts. The judgment of ouster was rendered in the trial court and affirmed on appeal in this court, where all the facts relating to the organization of the consolidated district and the attacks made upon its validity are fully stated. [State ex inf. v. Smith, 271 Mo. 168.] Following that decision of this court, the present information in the nature of a *quo warranto* was brought by the Attorney-General, seeking a forfeiture of the franchise of the Consolidated School District, upon the allegation that this had happened because of its failure “to provide for an eight months’ school” as required by Section 10776, Revised Statutes 1909. The present information also charged a failure to comply with the statute governing the formation of the consolidated school districts, and prescribing their duties.

The answer sets up the refusal of the former school districts to recognize the lawfulness of the consolidation, and failure of the county clerk to extend the taxes for its benefit until the decision of this court

affirming the validity of its corporation. [State ex inf. v. Smith, 271 Mo. 168, supra.] The answer further averred that respondent did maintain a high school and others required by law, as far as possible, and that the section of the statute (Sec. 10776) was unconstitutional.

Upon a trial, the evidence tended to show that in the year 1915, and subsequently, until the ruling of this court in 271 Mo. 168, supra, the county clerk uniformly extended the taxes for the benefit of the original school districts; that they never turned over the school property to the consolidated district; that the consolidated district did maintain a high school in one of the old districts, Camden Point, where it seems a district school was also maintained; that in 1915 the consolidated board employed an attorney to recover the school funds properly belonging to it, who made demand therefor to the county treasurer, which was refused. Shortly after the present proceeding, the consolidated district sought to enforce that demand by a mandamus suit; that up to the trial, owing to the obstructive tactics of the directors of the old school districts, and the inability of the consolidated district to recover the funds and property belonging to it, the teachers, employed by the board of the consolidated district, were also employed by the officers of the old district and were paid out of the moneys received of the latter. The evidence further discloses that after the county clerk signified his willingness, following the decision of this court supra, to extend the taxes for the benefit of the consolidated district, the present action was brought on the grounds stated above.

The trial court, upon a consideration of the testimony, adjudged the corporate existence of respondent to have been forfeited, and that its powers under its organization had lapsed. From that decision, this appeal was duly taken.

II. There is no merit in the suggestion of the respondent's answer that the Section 10776, upon which

this decision is chiefly rested, is unconstitutional, nor is any argument for that contention made in its brief. That section is a valid enactment and applicable according to its term "to school districts . . . that may be hereafter organized under the laws of this State," and, therefore, *ex necessitate*, applicable to a consolidated school district organized in pursuance of a subsequent statute. [Laws of 1913, pp. 721-2 et seq.)

The pith of this case is, whether, under the facts of the present record, the statute (R. S. 1909, sec. 10776) is invocable. Our conclusion is that neither the evidence adduced on the trial, nor the terms and intent of the statute, entitled the relator to set it up as a ground of forfeiture of the corporate rights of the respondent.

It will be observed, that the pertinent part of the section under review, is couched in the following terms:

"Sec. 10776. *Forfeiture of organization, etc.*—Whenever any school district in this State, now organized or that may be hereafter organized under the laws of this State, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory."

It will be seen at a glance, that the above provision for forfeiture is wholly inapplicable unless it shall be shown by the evidence that the funds in the hands of the school district, together with the levy of forty cents on the one hundred dollars' valuation, are sufficient for the maintenance of an eight months' school in one year. There is no substantial evidence in the present record to that effect, for until the final decision of this court validating the organization of respondent, it did not receive the public funds and cash on hand belong-

State ex inf. v. School District.

ing to the former school district to which it was entitled. [Laws 1913, p. 723, sec. 6.] Indeed, the mandamus suit, brought for that purpose by respondent, is still pending. This fact, in connection with the evidence showing an appropriation of such funds, and also intervening revenues from taxation belonging to respondent, by the officers and directors of the old school districts, thereby preventing respondent from the direct handling of such funds for the payment of teachers employed by it and compelling it, in order to maintain schools, in many instances, to employ the teachers selected by the old districts and to acquiesce in the payment of their salaries by the directors of the former school districts, are sufficient to exclude respondent from the purview of the statute in question, which shows on its face and by its terms, that it was only intended to affix a forfeiture for failure to provide an eight months' school in one year, when such omission did not result from *inability* "to have so long a term," or where the failure was purposeful or intentional on the part of the school district.

A thorough review of the testimony in this case, satisfies us of the entire good faith of respondent in the exercise, as far as possible, of all its corporate franchises. It did maintain a high school in
Good Faith. one of the districts, and seems to have maintained also, as far as possible, schools in the other localities where they had been theretofore maintained, through the medium of a payment of the salaries of teachers out of the revenues that were improperly in the hands of the directors of the former school districts. In these circumstances, the statute relied upon by relator is wholly inapplicable, for giving that statute its full scope and effect, as was done in the case of *State ex rel. v. Claxton*, 263 Mo. 701, it does not appear in the present case, as it did appear in that case, that the forty-cent levy and the public funds and cash on hand, provided a fund sufficient to maintain a school for eight months in one year. In that case, the sufficiency of the revenues of the school district was shown by an express agreement. In the present case, the record

does not show that the "public funds and cash on hands" belonging to the former school district has ever been turned over to respondent, nor its ability, without such funds, to have independently paid all of the teachers employed by it. Under the authority of that case and the facts of the present one, therefore, the statute invoked by relator has no application whatever to the present record.

Some reliance seems to have been placed by the learned trial judge, in his judgment forfeiting the franchise of respondent, upon the evidence tending to show the failure of duty on the part of
**Elementary
Schools.** respondent in the matter of maintaining an elementary school within the statutory distance of its pupils (Transportation not being provided for). [Laws 1913, p. 723, sec. 4.] It is needless to say, that the terms of the section referred to do not condition an automatic forfeiture upon its non-observance, and the courts are not willing to interpolate such a result in the terms of the statute.

In the case of State ex rel. v. School District No. 5, 195 Mo. App. 507, the judgment annulling the organization of the consolidated school district for failure to maintain schools, construed by that court to be within the purview of the act providing for the creation of such consolidated school district, was *sub silentio* affirmed without particular discussion as to whether the duty of the consolidated school district might not have been properly enforced by mandamus and without connoting the fact that the statute then under review did not affix forfeiture *eo nomine* to a mere omission to perform that duty, absent any intent to disobey the statute, or when compliance with its terms was wrongfully prevented. It is not necessary to say more as to the correctness of the views expressed in that opinion.

For the reasons heretofore given, the judgment in this case is reversed and the cause remanded with directions to the trial court to dismiss this proceeding. *Blair, Walker, Woodson, Williams, and Graves, JJ., concur.*

KANSAS CITY BOLT & NUT COMPANY, Appellant,
v. KANSAS CITY LIGHT & POWER COMPANY.

In Banc, July 24, 1918.

1. **PUBLIC SERVICE UTILITY: Contract Rate: Commission Rate.**

Where a public service corporation by written contract agreed to supply electric energy to a private manufacturing company for a designated length of time at designated rates, higher rates subsequently fixed by the State Public Service Commission by the adoption of a schedule of rates applicable for all service of the kind furnished by the public utility, if reasonable, supersede such contract rates, and the manufacturing company is not entitled to an injunction restraining the public service corporation from discontinuing the service upon a refusal to pay such higher rates.

2. ———: ———: **Police Power.** The power to fix the price at which a public utility corporation is to furnish electricity to the public arises from the police power of the State, which under the Constitution cannot be abridged by contract between the corporation and private citizens; and where the Legislature has by statute designated the Public Service Commission as the instrumentality to exercise such rate-making power, and it in conformity with the statute fixes a schedule of reasonable rates for public service within the bounds of a city, its rates automatically supersede all contract rates coming in conflict with them.

Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall*, Judge.

AFFIRMED.

Rees Turpin for appellant.

(1) The contract upon which this case turns was lawful and valid when made and was made before the Public Service Commission Act of 1913 was enacted. *Bell v. Mulholland*, 90 Mo. App. 612; Sec. 3367, R. S. 1909; *Moorshead v. United Railways Company*, 203 Mo. 121; *State ex rel. St. Joseph Water Company v. Eastin*, 270 Mo. 193, 192 S. W. 1006; *Door Company v. Fuelle*,

215 Mo. 421; Johnson v. United Railways, 247 Mo. 326; State ex inf. v. Standard Oil Company, 218 Mo. 1; State ex rel. v. Water, Light & Transit Co., 249 Mo. 649. (2) The Legislature did not intend that the Public Service Commission Act should disturb contracts made before its enactment. State ex rel. v. Railroad, 262 Mo. 720. (3) It was beyond the power of the Legislature, by the enactment of the Public Service Commission Law or otherwise, to impair the obligation of a contract lawfully made. State v. Hawthorn, 9 Mo. 389; State v. George Miller, 50 Mo. 129; State ex rel. v. Miller, 66 Mo. 328; St. Vincent's College v. Schaefer, 104 Mo. 261; State ex rel. v. Board of Trustees of Westminster College, 175 Mo. 52; State ex rel. v. Trustees of William Jewell College, 234 Mo. 299; Home Telephone Co. v. Sarcoxie Light & Telephone Co., 236 Mo. 114; Detroit v. Detroit United Ry. Co., 173 Mich. 314, 242 U. S. 238; Boswell v. Security Mutual Life Insurance Company, 193 N. Y. 465, 19 L. R. A. (N. S.) 946. (4) This court has said definitely that the Public Service Commission Act does not impair the obligation of contracts made before its passage. State ex rel. v. Railroad, 262 Mo. 720; Public Service Commission v. Union Pacific Ry. Co., 197 S. W. 39; Quinn v. American Bankers Assurance Company, 183 Mo. App. 8; Zachra v. Manufacturing Company, 179 Mo. App. 683; Sweeney v. Heap Company, 194 Mo. App. 140. (5) The contract is enforceable against the defendant. K. C. Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482; Johnson v. United Rys. Co., 247 Mo. 360. (6) Plaintiff is entitled to injunctive relief. Sedalia Brewing Co. v. Sedalia Water Works Co., 34 Mo. App. 49; Jaccard Jewelry Co. v. O'Brien, 70 Mo. App. 432; Burke v. Olquott Water Co., 84 Vt. 121, 33 L. R. A. (N. S.) 1015; Gordon v. Mansfield, 84 Mo. App. 367; Overall v. Ruenzi, 67 Mo. 203; Western Union Telegraph Co. v. Guernsey & Scudder Electric Light Co., 46 Mo. App. 120; Albers v. Merchants' Exchange, 39 Mo. App. 583; Wills v. Forester, 140 Mo. App. 321.

John H. Lucas for respondent.

(1) The bill states no ground of equity. R. S. 1909, sec. 2534; *Burgess v. Kattelman*, 41 Mo. 480; *Hopkins v. Lovell*, 47 Mo. 102; *Sternes v. Franklin Co.*, 48 Mo. 167; *Carpenter v. St. Joseph*, 263 Mo. 713; *Primm v. White*, 162 Mo. App. 605; *School Dist. v. McFarland*, 154 Mo. App. 419; *Graden v. Parkville*, 114 Mo. App. 533; *Strother v. Cooperage Co.*, 116 Mo. App. 518; *Victor Mining Co. v. Morning Star Min. Co.*, 150 Mo. App. 525. (2) The contract is against public policy, and void at common law. Mo. Constitution, art. 12, sec. 5; *Collyer on Public Service Companies*, sec. 126, p. 274; *Ib.*, secs. 127 and 129, pp. 276 and 281; *State ex rel. v. Ins. Co.*, 152 Mo. 1; *Karnes v. Ins. Co.*, 144 Mo. 413; 2 *Purdy Beach on Private Corporations*, p. 1367, par. 609; *Ib.*, pp. 1287, 1370, 1438, 1474; *Laws 1891*, p. 186; R. S. 1909, chap. 98; R. S. 1909, sec. 10316; R. S. 1909, sec. 10319; 2 *Wyman on Public Serv. Corp.*, pars. 1314, 1316, 1318; *Home Tel. Co. v. Coxey Tel. Co.*, 236 Mo. 114; *Tranberger v. Railroad Co.*, 250 Mo. 55; *Powell v. Railroad Co.*, 250 Mo. 462; *State ex rel. v. Roach*, 267 Mo. 315; *State ex rel. v. Roach*, 267 Mo. 314. (3) The contract is void under Commission Act. *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, 208 L. Ed. 167; *Louisville & Nashville v. Mottley*, 219 U. S. 467, 55 L. Ed. 297; *Penny & Boyle Co. v. Los Angeles Gas & El. Co.*, L. R. A. 1915-C, p. 282; *Pulitzer v. McNichols*, 172 Mo. App. 709; *Rosenberger v. Express Co.*, 258 Mo. 97; *Harvest King Distillery v. Express Co.*, 192 Mo. 173; *State ex rel. v. K. C. Gas Co.*, 245 Mo. 515; *Public Service Com. Act*, *Laws 1913*, secs. 68-69; *Public Service Comm. v. Union Pacific*, 197 S. W. 40. (4) The Public Service Commission Act controls alleged contracts made before its passage. *State ex rel. Roach*, *supra*.

WILLIAMS, J.—The plaintiff seeks to enjoin the defendant from discontinuing the supply of electric energy to plaintiff's manufacturing plant as provided

under the terms of a certain contract entered into on the 6th day of September, 1912, by and between the plaintiff and defendant's predecessor. Upon a trial had before the circuit court of Jackson County judgment went for defendant. Plaintiff duly appealed.

The facts necessary to an understanding of the issues involved are few and simple and may be summarized as follows:

On September 6, 1912, the predecessor of the defendant power company, a public service corporation located at Kansas City, Missouri, entered into a contract with the plaintiff corporation whereby, for a certain specified price and during the life of the contract, it agreed to supply electric energy for the operation of the plaintiff's manufacturing plant located within the corporate limits of said city.

On April 17, 1917, the Public Service Commission, proceeding in conformity with the provisions of the Public Service Commission Act, after a valuation was made and full hearing had, made an order establishing a schedule of rates which the defendant company should be permitted to charge for electric energy at Kansas City, Missouri.

It is not necessary that the details of the contract rates nor of the rates established by the Commission be given (because the legality of the Commission rate is not involved upon this appeal), but it is sufficient for the purpose of this case to say that the cost to plaintiff for the electric energy required to operate its plant was higher under the rates established by the Commission.

The defendant threatened to discontinue the service if the appellant longer refused to pay the rate which had then been placed on file with the Public Service Commission and which was afterwards established as the proper rate by the Commission.

The appellant relying upon the contract refused to pay the amount demanded and instituted this suit.

While there are some minor propositions discussed in the briefs there is one main question which will dis-

pose of the case. We shall therefore confine our discussion to the one main question, viz.:

Did the order of the Public Service Commission fixing the rates which the defendant company could charge for electric energy at Kansas City, Missouri, supersede the rates fixed by the contract theretofore existing between the parties?

Under the recent holding in the cases of *State ex rel. City of Sedalia v. Public Service Commission et al.*, 275 Mo. 201, and *City of Fulton v. Public Service Commission*, 275 Mo. 67, the above question must be answered in the affirmative.

In the *Sedalia* case *supra* it was held by Division One that the schedule of reasonable water rates fixed by the Public Service Commission superseded the rates fixed by contract between the municipal corporation and the public service corporation. It was there held (1) that the power to make rates for public service arises from the police power of the State; (2) that the instrumentality designated by statute to exercise such rate-making power is the Public Service Commission; (3) that under the provision of Section 5 of Article 12 of the Constitution of Missouri the police power cannot be abridged by contract; (4) that therefore when the Public Service Commission fixes a schedule of reasonable rates for public service in conformity with the provisions of the Public Service Commission Act such rates automatically supersede all contract rates coming in conflict therewith.

The above case was cited and approved by Court in Banc in the *Fulton* case *supra*.

The principle involved in the case at bar is the same as that involved in the two cases cited.

No valid reason can be stated why a rate contract entered into between a private manufacturing corporation and a public service corporation (as is the situation here) would not (if permitted to stand) be just as much an abridgement of the rate-making power of the State as would a rate contract between a muni-

cipality and such public service corporation (as was the situation held in judgment in the cases above cited).

Appellant's present contentions have been fully answered in the cases above cited. Further discussion is therefore unnecessary.

For the reasons stated in those cases we hold that the contract rates involved in the case at bar must give way to the rates fixed by the Commission. It therefore follows that the judgment should be affirmed. It is so ordered. *Walker, Faris, Blair and Woodson, JJ.*, concur; *Bond, C. J.*, concurs in the result.

THE STATE ex rel. AUDRAIN COUNTY v. GEORGE
E. HACKMANN, State Auditor.

In Banc, July 24, 1918.

1. **CONSTITUTIONAL LAW: Hospital Act: Purpose.** The Act of 1917 (Laws 1917, p. 145) authorizing counties to establish and maintain public hospitals, and to levy a tax and issue bonds therefor, has for its primary purpose, as shown by its terms, the providing for the construction of public county hospitals and the creation of a public debt for that purpose. The rate of taxes to be levied for the purpose of paying the debt was not the main purpose nor a vital element of the act.
2. ———: ———: **Rate to Pay Debt: Self-Enforcing.** That part of the Constitution requiring a municipality, when creating a debt beyond the income and revenue of the current year, to "provide for the collection of an annual tax sufficient to pay interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years," is self-enforcing, and is effective without legislative action.
3. ———: ———: ———: **Limited to Two Mills Tax.** So much of the County Hospital Act of 1917 as undertook to fix a maximum rate of two mills on the dollar-valuation of property as the tax to be levied to pay the bonds was a work of supererogation, since the Constitution itself requires "an annual tax sufficient" to pay the interest and principal of the debt within twenty years, which is as much a part of the act as if it had been written into it. If the rate of two mills on the dollar is sufficient then it is a valid rate; and if not sufficient, then the limitation to two mills is

State ex rel. v. Hackmann.

harmless, because the constitutional requirement *proprio vigore* was substituted for it.

4. ———: ———: **Limitation of Tax Rate: Separate From Rest of Act.** Where some portions of a legislative act are invalid and, after they are separated from what is valid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted had it known that the excised portions were invalid, the act will be upheld. It is apparent from the terms of the County Hospital Act of 1917 that the Legislature would have enacted it had it contained no provision limiting the rate of taxation to pay the bonds to two mills on the dollar; and disregarding all its provisions relating to the rate of taxation, since the Constitution itself supplies them, a valid and complete act remains.
5. ———: ———: **Anticipation of Revenue.** The County Hospital Act of 1917 was not enacted in pursuance of the powers or with reference to the objects specified in Section 11 of Article 10 of the Constitution, and hence it is not invalid as an attempt to authorize the issuance of bonds in anticipation of collection of increased rate of taxation.

MANDAMUS.

PEREMPTORY WRIT ISSUED.

R. D. Rogers and *Charles & Rutherford* of counsel for relator.

(1) A county hospital is a public building, and, therefore, the erection and maintenance of a county hospital is a public purpose. In re Board of Commissioners v. Peter, 253 Mo. 352. (2) Every presumption in favor of the validity and constitutionality of the Act of April 9, 1917, will be indulged by the courts, and the act will not be held to be unconstitutional unless it so plainly violates some provision of the Constitution that there is no escape from such conclusion. Board of Commissioners v. Peter, 253 Mo. 520. (3) Such a construction of a statute should be adopted as will save the statute and make it operative. State ex rel. v. Duncan, 265 Mo. 47. And as will give effect to the intent of the lawmakers. State ex rel. v. Duncan, 265 Mo. 26. (4) The main and essential purpose of the act is to authorize the different counties to proceed under the provisions of Section 12 of Article 10 of the Con-

stitution in the incurring of indebtedness by the voting of bonds to provide funds for a public purpose. (a) This section requires the levy and collection of taxes sufficient in amount to retire such an indebtedness within twenty years. A provision in the Hospital Act for a tax for twenty years, indicates, therefore, the legislative intention that the bonds are to be retired within the time required by the Constitution for a bonded indebtedness. (b) It would be absurd to assert that the tax provisions of the act constitute the main features, the essentials, of the act; because the tax is for a period of twenty years only. And this conclusively shows an intention on the part of the Legislature that the tax should be for the retirement of an indebtedness in twenty years, as provided in the Constitution; and not for the support of the hospital, for that would mean a cessation of the tax, and an abandonment of the whole hospital project, at the end of that period. (c) The form of ballot prescribed by the act indicates that the main purpose and subject of the act has reference to the incurring of debt. (d) That part of the ballot referring to a tax may even be disregarded; because any form of ballot giving the voter full knowledge of the issue involved, viz, the incurring of debt, is sufficient. *Dick v. Scarborough*, 73 S. C. 150; *State ex rel. v. Stangyer*, 197 S. W. (Mo.) 251; *State ex inf. v. Clardy*, 267 Mo. 384; *Russell v. Croy*, 164 Mo. 95. (5) Even assuming that certain portions of the Act of 1917 may appear to be invalid, this does not invalidate the whole act. Such invalid portions do not go to the essential features of the act. They may be elided, and a complete and workable statute will still remain, under the provisions of which the bond issue is valid. *State ex rel. v. Gordon*, 268 Mo. 713; *Hislop v. Joplin*, 250 Mo. 588; *Home Telephone Co. v. Carthage*, 235 Mo. 668. A part of a statute may be constitutional and a part unconstitutional; in which events, if the part which is unconstitutional can be eliminated without destroying the law, then it will be declared valid. *State ex inf. v. Duncan*, 265 Mo. 46; *State ex rel. v. Gordon*, 236 Mo. 170; *Shively v. Lank-*

State ex rel. v. Hackmann.

ford, 174 Mo. 549; State ex rel. v. Field, 119 Mo. 612; State ex inf. v. Washburn, 167 Mo. 680. (6) Section 11 of Article 10 of the Constitution has no application. The essential purpose of the act, the incurring of indebtedness for the establishment of hospitals, is referable to Section 12 of Article 10 of the Constitution. (7) The provision of Section 12 of Article 10 of the Constitution requiring the levy of a tax to pay a debt incurred and interest thereon is self-executing. Evans v. McFarland, 186 Mo. 703; Black v. Early, 208 Mo. 281; State ex rel. v. Allen, 183 Mo. 292; 1 Dillon on Munic Corps. (5 Ed.), sec. 191, p. 342. (a) The tax provisions of the statute can add nothing to the Constitution; are mere surplusage; and may be disregarded. (b) No vote on the levy of a tax was necessary to make valid the bonds voted for a public hospital. Evans v. McFarland, 186 Mo. 726.

Frank W. McAllister, Attorney-General, *S. P. Howell*, Assistant Attorney-General, *Thomas J. Cole*, of counsel for respondent.

(1) It is the duty of respondent, as State Auditor, to determine whether there is authority of law for the issuance of the bonds; and if such exists, whether all the conditions of the statutes, applicable thereto, have been complied with in the particular issue presented for registration. Sec. 1275, R. S. 1909; State ex rel. Dexter v. Gordon, 251 Mo. 313, Thornburg v. School District, 175 Mo. 12; State ex rel. Pike County v. Gordon, 268 Mo. 326. (2) The Act of April 9, 1917, is violative of and in conflict with the first proviso contained in Section 11 of Article 10 of the Constitution. Laws 1917, 145; State ex rel. v. Wilder, 200 Mo. 105; Haussler v. St. Louis, 205 Mo. 690. Section 11 of Article 10 of the Constitution restricts the amount of tax rate, and then contains a proviso under the authority of which, upon meeting the conditions therein set out, and increased rate may be levied for the purpose designated, namely, the erection of public buildings; but it grants no authority to vote such increased rates for the support and maintenance

of such buildings. *Black v. McGonigle*, 103 Mo. 202; *Barnard v. Knox Co.*, 105 Mo. 389; *State ex rel. v. Columbia*, 111 Mo. 379; *Brooks v. Schultz*, 178 Mo. 226. (3) The act in question is unconstitutional for the further reason that its terms specifically and directly violate and conflict with the provisions of Section 12 of Article 10 of the Constitution. Sec. 1, Laws 1917, p. 145; *Black v. Early*, 208 Mo. 312; *State ex rel. v. Gordon*, 217 Mo. 118; *State ex rel. v. Allen*, 183 Mo. 293; *Evans v. McFarland*, 186 Mo. 727; *State ex rel. v. Walker*, 193 Mo. 706. Whether or not a legislative enactment impinges upon a constitutional provision is to be determined, not by what has been done under it, but by what may under its authority be done. *Sterrett v. Young*, 82 Pac. 946; *Board of Education v. Aldredge*, 13 Okla. 205; *Lumsden v. Milwaukee*, 8 Wis. 485. (4) The said Hospital Act further violates the provisions of Section 11 of Article 10 of the Constitution, in that said section grants no authority for the issuance of bonds in anticipation of the collection of an increased rate of taxation beyond the rate allowed by said Section 11, although such increased rate may be authorized by two-thirds of the qualified voters of such county voting therefor. Secs. 1, 2, 4 and 6, Laws 1917, p. 145; *Benton v. Scott*, 168 Mo. 397; *Lamar v. City of Lamar*, 128 Mo. 216; *Harris v. Bond Company*, 244 Mo. 693.

BOND, C. J.—I. This is an original proceeding, seeking our writ of mandamus to compel respondent,

Statement. George E. Hackmann, as Auditor of the States of Missouri, to register Bond No. 1 of an issue of \$75,000 of bonds of Audrain County. Respondent waived the issuance of an alternative writ of mandamus and the case was submitted to the court upon the petition which stands as and for the writ and the return made thereto. The undisputed facts are as follows:

In December, 1917, a petition, signed by more than one hundred resident freeholders of Audrain County, more than fifty of whom were non-residents of the city of Mexico, was filed in the county court of said county, in which the intention to erect and maintain a public hospital in the city of Mexico was stated and asking that an annual tax be levied for its establishment and maintenance, the sum of \$75,000 being the maximum amount proposed to be expended therefor. The petition further asked the court to submit the question to the qualified voters of Audrain County at a special election, duly called for that purpose upon proper notice to said voters, limiting the rate of the tax to be levied to one-half mill on the dollar for a period not longer than twenty years, and also providing for the issue of bonds to advance said project.

Said special election, after due notice, was held on April 5, 1918, and the question whether said tax of one-half mill on the dollar should be levied on the taxable property of said county for the erection of said public hospital, was duly submitted and carried by a two-thirds vote of the qualified voters. Following said election, the county court ordered and directed that certain negotiable coupon bonds of said county, to be known as "public hospital bonds," be prepared, executed, and registered in the office of the State Auditor; that said bonds should bear the date of May 1, 1918, be seventy-five in number, \$1000 each in denomination, and to mature serially \$15,000 each year from 1923 to 1927, both inclusive, with interest at five per cent per annum, payable semi-annually.

The petition further states that afterwards, in compliance with said court order, "Public Hospital Bond No. One" of said Audrian County, maturing May 1, 1923, was duly executed and presented to respondent, George Hackmann, State Auditor, together with the proper regristration fee, who refused and still refuses to register said bond.

In his return respondent admitted every allegation of fact alleged in the petition and averred that there was passed by the 49th General Assembly of the State of Missouri an act (Laws 1917, page 145) to enable counties to establish and maintain public hospitals, levy a tax and issue bonds therefor, etc; that said act was approved April 9, 1917; that the bond relator seeks to have registered was authorized and executed in pursuance of a special election held under and by virtue of the provisions of said act; that respondent should not be required to register said bond because said act is in violation with the first proviso of Section 11 of Article 10 of the Constitution of Missouri which authorizes an increase of the rate of taxation for the purpose of erecting public buildings in counties when properly authorized, while the Act of 1917 purports to authorize the levy of an increased rate of taxation for the support and maintenance of public hospitals; that the Act of 1917 is also in violation of the second proviso of Section 12 of Article 10 of the Constitution in that, although said proviso makes it mandatory to provide for the collection of a tax sufficient to pay interest and provide a sinking fund for the retirement of the principal within twenty years, yet the 1917 enactment limits the rate of taxation proposed not to exceed two mills on the dollar of property valuation; that the 1917 act is in violation of Section 11 of Article 10 of the Constitution in that it attempts to authorize the issuance of bonds in anticipation of collection of increased rate of taxation, which is not authorized by and would conflict with said section of the Constitution.

II. A fair consideration of the terms and purposes of the act under review demonstrates that the Legislature intended the primary purpose of providing for the construction of public county hospitals and the creation of a public debt for that purpose. This design is manifested not only in the title to the act, but in each of the succeeding

**Rate of
Taxation.**

sections and is inescapable when it is read and interpreted as a totality. [Laws 1917, page 145 et seq.] In considering the particular sections and provisions of the act, the paramount object of the Legislature to grant to the counties of the State the right to "establish a public hospital" and to incur an adequate indebtedness to carry out that purpose, must be constantly borne in mind. When this is done, it becomes at once apparent that the Legislature framed its enactment under the authority of that provision of the Constitution restricting the power of counties and other sub-divisions of the State from becoming indebted beyond the income and revenue of the current year "without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; . . . and *provided further*, that any county, . . . incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same." [Constitution of 1875, Art. 10, Sec. 12.]

It is the established law in this State, that the clause above quoted relating to a provision for the payment of the interest and principal of such indebtedness is a self-enforcing edict of the Constitution not requiring for its effectiveness any legislative action whatever. [Evans v. McFarland, 186 Mo. l. c. 727; Black v. Early, 208 Mo. 281; State ex rel. v. Allen, 183 Mo. l. c. 292; Dillon On Municipal Corporations (5 Ed.), sec. 191, 342; East St. Louis v. Amy, 120 U. S. 600.] In the latter case, the doctrine governing such a constitutional provision, is thus expressed:

"This provision for the tax was written by the Constitution into every law passed thereafter by the Legislature allowing a debt to be incurred; and, in our opinion, it took the place in existing laws of all provisions for taxation to pay debts thereafter incurred

under old authority which were inconsistent with its requirements. It was made by the people a part of the fundamental law of the State that every debt incurred thereafter by a municipal corporation, under the authority of law, should carry with it the constitutional obligation of the municipality to levy and collect all the necessary taxes required for its payment."

That the constitutional provision (Sec. 12, Art. 10) under which the act under review was framed, is the *one* which specifically provides for the creation of county indebtedness beyond its annual income and revenue for any year, was directly adjudged in a case where its scope and purpose were distinguished from that of Section 11 of Article 10 of the Constitution. [Lamar v. City of Lamar, 128 Mo. l. c. 216.] It necessarily follows, that so much of the act under review, as undertook to fix a maximum rate of two mills for the taxation therein prescribed was a work of supererogation, since the constitutional requirement that the county should provide an "annual tax sufficient" to pay the interest and principal of indebtedness was as much a part of the act under review as if it had been set out therein in so many words. If the specific limitation of two mills on the dollar, contained in the act, is "sufficient," then it would be a valid rate to be fixed by the county. If not, it was a harmless provision since the Constitution *proprio vigore* was substituted therefor.

We therefore overrule the contention of respondent that the insertion of a fixed rate in the legislative act, violated any provision of the Constitution of this State.

III. It also necessarily follows, that the inclusion within the act under review of a provision limiting the rate of taxation to two mills on the dollar, was not an interdependent portion of the entire act providing for the establishment of a public hospital and the incurring of an indebtedness to that end, and, hence, if it should turn out that a higher rate of taxation is necessary to accomplish the objects and purposes of the act, that would

**Separable
Invalid
Provisions.**

constitute no valid reason why a *mistake* on the part of the Legislature, as to the proper rate of taxation, or proper means of enforcing and carrying out their purpose to provide for public hospitals in the counties of the State, should be held to destroy an entire act which is otherwise susceptible of being effectuated under the substitutional clause of the Constitution. [State ex rel. v. Taylor, 224 Mo. l. c. 474.]

The test of the right to uphold a law, some portions of which may be invalid, is whether or not in so doing, after separating that which is invalid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted if it had known that the excised portions were invalid. [State ex inf. v. Duncan, 265 Mo. l. c. 45.] There is no room for doubt in the present case, that the Legislature, in the exercise of the power devolved upon it under Section 12 of Article 10 of the Constitution, would have enacted a law for incurring an indebtedness to carry out its design of enabling counties of the State to build and maintain public hospitals, irrespective as to the sufficiency of two mills on the dollar to furnish sufficient revenue for the indebtedness thereby incurred. And it would necessarily thwart this purpose on the part of the law-making body to hold, as insisted by respondent, that the act in question would not have been framed except for the purpose of limiting the rate of taxation to the amount therein prescribed.

Our conclusion is that, disregarding any and all provisions in the act in review relating to the limit of taxation, an independent enactment, valid and complete, remains, the means of enforcing which was completed by the Legislature itself.

IV. From what has been said, we are unable to concur in the view that the act in question is in controversion of Section 11 of Article 10 of the Constitution of the State. It was not enacted by the Legislature in pursuance of the powers or with reference to the objects specified in that section, as has been shown. Our con-

clusion is that the writ in this case should be made peremptory.

It is so ordered. All concur except *Faris, J.*, absent.

THE STATE v. ALLEN STEMMONS, Appellant.

Division Two, July 30, 1918.

1. **SEDUCTION: Corroboration.** While it is not necessary, in a prosecution for seduction, that there shall be two witnesses to sustain the charge, nor need the corroborative evidence be tantamount to another witness, it must be sufficient to counterbalance the testimony of the accused and thus remove the legal presumption of his innocence.
2. ———: ———: **Promise of Marriage.** In a prosecution for seduction corroborative testimony is required only as to the promise of marriage, and may consist of circumstances, but must come from others than the prosecutrix. It may consist of evidence of such conduct on the part of the parties as usually accompanies a promise of marriage, or admissions of the defendant, or continued attentions by him to prosecutrix, covering a long time, including frequent visits, during which she kept no other company, and proof of preparations for marriage made by prosecutrix following a continuous courtship is competent.
3. ———: **Promise of Marriage: When Made.** In a prosecution for seduction it is not necessary that the promise of marriage be made immediately preceding the intercourse; all that is necessary to show is that if made then or previously defendant thereby accomplished prosecutrix's seduction.
4. ———: **Proof That Prosecutrix Was Unmarried.** It is essential in a seduction case that it be made to appear by evidence that prosecutrix was unmarried; but such status may be shown by facts and circumstances. So where prosecutrix testified that she had never had sexual intercourse with any one except defendant, that he told her that if she got into trouble on account of her relations with him he would marry her at once, she bore her parent's name, was questioned throughout the trial as "Miss," was referred to as "this girl," and the details of her manner and place of living and of her associations with defendant indicated an unmarried status, the evidence was sufficient to support a finding that she was unmarried, although there was no affirmative statement by any witness that she was unmarried.

State v. Stemmons.

5. ———: **Barter for Promise.** The forceful facts of this case, showing the bringing into play by defendant of the arts and blandishments of the seducer, leave nothing on which to base a contention that, instead of being seduced within the meaning of the statute, prosecutrix bartered away her virtue in exchange for a promise of marriage.
6. ———: **Instruction: Argumentative: Comment on Evidence: Attributing Pregnancy to Betrayal.** An instruction which is argumentative in form, and an improper comment on the testimony of prosecutrix, should be refused; and an instruction in a seduction case, which tells the jury that they should "scrutinize the testimony of the prosecutrix very closely, for the law assumes that a woman, finding herself pregnant, has the most potent motives to assert her condition was brought about by a promise of marriage, for very obvious reasons: she must excuse the act to her family, to her friends and to society, and every consideration would impel her to attribute it to deception and betrayal," is such an instruction.
7. ———: ———: **Corroboration of Promise: Preparations for Marriage.** There being positive testimony by others than prosecutrix that after the promise she had made preparations for marriage, and defendant having made no effort to show that they were not made nor to question their good faith, the trial court did not err in giving an instruction authorizing the jury to consider the preparations she had made for housekeeping as one of the corroborating circumstances of the promise of marriage, "although it has not been shown that defendant had knowledge of such preparations."

Appeal from Jasper Circuit Court.—*Hon. R. A. Pearson*, Judge.

AFFIRMED.

J. D. Harris for appellant.

(1) The testimony of the prosecutrix ought always, in this class, of cases, to be closely scrutinized; for finding herself pregnant she has the most potent motives to assert that her condition was brought about by promise of marriage. *State v. Eckler*, 106 Mo. 593.
(2) If the illicit intercourse was permitted, by the prosecuting witness, as a mere barter and trade for the promise of marriage, then it is not seduction under

275 Mo.—35

the provision of the statute. The evidence developed on the trial is not sufficient in this case to support the verdict. The testimony of the prosecutrix shows that the illicit intercourse was permitted by her as a mere barter and trade for the promise of marriage. In order to constitute this offense there must be the exercise of certain influences upon the affections of the female by reason of the promise of marriage, and there must be to some extent the bringing into play of certain arts and blandishments directed to her, reasonably sufficient, aided by the promise of marriage, to have her yield to his desires. These things cannot occur where the prosecutrix stands off and at arms-length barterers the illicit intercourse for the promise. *State v. Mitchell*, 229 Mo. 698, 676; *State v. Reeves*, 97 Mo. 677. (3) The burden rests upon the State to prove, as an essential element of the crime charged, that the prosecutrix was an unmarried woman. There is a total failure of proof on this subject. *State v. Wheeler*, 108 Mo. 664. (4) There is no sufficient evidence to corroborate the prosecutrix, as to the promise of marriage, to sustain a conviction. That such corroboration is essential is settled by the statute and by the decisions. R. S. 1909, sec. 5235; *State v. McCaskey*, 104 Mo. 644. The act and conduct of the defendant, as detailed by the prosecutrix, instead of tending to corroborate her on her claim that there was a promise of marriage is all the other way. If he had promised to marry her, why did she not confront him with that promise before her own people and his people at the time she found herself in an unfortunate condition? Why did she wait until after the child was born before undertaking to bring him to account on such alleged promise? Her own tardiness in making the charge against the defendant and on the very eve of his marriage to another young woman taints her whole contention as to the pretended promise of marriage with suspicion. *State v. Reeves*, 97 Mo. 677. (5) Instruction number three given on behalf of the State is erroneous. The vice of this instruction consists in a comment on the evidence; an assumption

State v. Stemmons.

that certain facts were true that were, in fact, controverted; and in reference to acts of the prosecutrix, out of the presence and without the knowledge of the defendant, as being sufficient to corroborate her on the promise of marriage. (6) The rule that a promise of marriage or its repetition must be made at the time of the illicit relation was established in the case of *Wilson v. State*, 58 Ga. 328, and in the case of *Espy v. Jones*, 1 Ala. 454. The *Wilson* case is quoted with approval by this court in *State v. Thornton*, 108 Mo. l. c. 653, and it is submitted that this is the true rule of decision. *State v. Eckler*, 106 Mo. 592. Granting there was a previous promise of marriage made two or three months before the illicit intercourse, the solicitation and procurement of illicit intercourse could hardly reasonably be referred back to that promise of marriage, unless the promise of marriage was renewed or again made.

Frank W. McAllister, Attorney General, and *George V. Berry*, Special Assistant Attorney-General, for respondent.

(1) Instruction D asked by defendant was properly refused as an unwarranted comment on the evidence. *State v. Lewis*, 264 Mo. 432; *State v. Sublette*, 191 Mo. 173; *State v. Mitchell*, 229 Mo. 697; *State v. Grugin*, 147 Mo. 56; *State v. Kimmell*, 156 Mo. App. 468; *State v. Chinn*, 153 Mo. App. 613. (2) There was no evidence of any barter or trade at the time of seduction. *State v. Walker*, 232 Mo. 264; *State v. Reed*, 237 Mo. 226; *State v. Mitchell*, 229 Mo. 698; *State v. Phillips*, 185 Mo. 188; *State v. Eckler*, 106 Mo. 587. (3) The State proved every essential element in the case. *State v. Fisher*, 162 Mo. 171; *State v. Reed*, 153 Mo. 453; *State v. Marshall*, 137 Mo. 466; *State v. Thornton*, 108 Mo. 554; *State v. Waterman*, 75 Kan. 257; *State v. Heather-ton*, 60 Iowa, 177; *Lewis v. People*, 37 Mich. 520. (4) There was ample evidence in corroboration of the prosecutrix as to the marital engagement. *State v. Eisenhour*, 132 Mo. 147; *State v. Davis*, 141 Mo. 525; *State v. Wheeler*, 108 Mo. 665; *State v. Hill*, 91 Mo. 425; *State*

v. Fischer, 124 Mo. 463; State v. Dent, 170 Mo. 406. (5) Instruction Number 3 correctly declared the law and was fair to defendant. State v. Walker, 232 Mo. 264; State v. Fogg, 206 Mo. 709; Underhill on Criminal Evidence, sec. 388, p. 666; Rice on Crim. Evidence, p. 878; 35 Cyc. 1364.

WALKER, P. J.—An information was filed in the circuit court of Jasper County, charging defendant with seduction under promise of marriage. Upon a trial, he was convicted and sentenced to two years imprisonment in the penitentiary. From this judgment he appeals.

Soon after defendant became acquainted with the prosecutrix, in December, 1914, he became very attentive to her and so continued until August, 1915, when he proposed marriage, and she accepted. Moved by his promise, she prepared table linen, sheets, pillow cases, and other articles necessary for household use. He continued his attentions until October, 1915, and one day when they were out riding in an automobile, he insistently solicited sexual intercourse with her, urging her that, being engaged, they were married in the sight of God, and that a marriage ceremony was merely a formality, and would make no difference in their relations. She demurred, saying that they were not married in the sight of man. He persisted in his solicitations, declaring if she cared for him, she would consent; that no one would ever know of it. Relying, as she says, upon his promise to marry her, like Donna Julia, "a little still she strove, and much repented, and whispering that she'd ne'er consent, consented." Again in November, 1915, moved by like blandishments, protestations, and promises on his part, she lent herself to his embraces. As a consequence of this intercourse, she became pregnant and gave birth to a child in July, 1916.

Good news is received gladly, but reluctant credence is given to evil tidings. When, therefore the prosecutrix told the defendant of her condition, he refused to believe her. Finally convinced, he procured some

State v. Stemmons.

medicine for her relief, and gave it to her. Its effect was futile. He then consulted a physician who refused to perform an abortion on the prosecutrix. Defendant then told the prosecutrix he would take her to some place where she could have attention. It was arranged that she was to write to her parents that she was coming home, being then at her grandmother's in Jasper County, and her parents residing in Kansas. But, instead of going home, she was to go to Kansas City, where he would meet her. In compliance with this agreement, she went to Kansas City, where he met her at the railroad station, took her to a maternity hospital, and made arrangements for her stay there until after her confinement, paying the manager \$100 to defray her expenses, and subsequently an additional \$100 for a like purpose. He went away and did not return until several days later. Her parents, in the meantime, had learned of her condition and whereabouts, and by agreement defendant met them at the hospital. He reached there before they did. Upon his arrival, he informed the prosecutrix that her parents knew of her condition, and were coming to see her. He requested her to tell them that she did not want to marry the defendant until after the baby was born; that immediately after its birth, it could be put in a home and she could get it later, and that she must make a favorable report of his relations with and conduct towards her. When the parents arrived, they found the defendant there in conversation with the prosecutrix. In response to an inquiry made by the mother, defendant stated that he knew no one else than himself had engaged in sexual intercourse with the prosecutrix. Asked further by the mother if he would marry the prosecutrix, he replied: "I didn't say I wouldn't."

Defendant testifying in his own behalf, denied all of the facts of an inculpatory nature in the foregoing statement. He admits that he arranged for the prosecutrix's stay at the maternity hospital, and that he paid her expenses while there; but says he did this through fear of blackmail; that he had never shown the prosecu-

trix any attention as a lover, and had seldom ever been in her company; that he had never had sexual intercourse with her; that his acquaintance with her was but casual; that she came to a drug store in the neighborhood, where he was employed, told him she was pregnant, and asked him to give her something to produce an abortion; that he refused to do so; that she persisted in her request, and finally said, if he did not provide a means for her relief, she would charge that he was the cause of her trouble; that, impelled by fear of her so doing, he went to a physician and solicited his aid in the matter; that the latter refused to become a party to the proposed crime; and as a last alternative, in an effort to remove from his horizon this impending cloud, he took her to Kansas City, placed her in a maternity hospital and advanced the money for the attention she was to receive while there.

The record is burdened with other testimony pro and con, much of it entirely irrelevant, to impeach this or that witness, or to show by facts and circumstances, often remote in their connection with the main issue, the relations existing between the principals in this miserable drama. We have set out enough of the testimony to define its general character. What we are concerned in is the proof as to the promise here alleged to have been made, as affecting the commission of the crime charged, and the other errors assigned, as we may be able to glean them from the argument submitted by counsel for defendant under the misleading title, as here employed, of Points and Authorities.

I. It is contended that the testimony of the prosecutrix as to the promise of marriage was not sufficiently corroborated, and as a consequence, that
Corroboration. the crime charged was not made out as required by Section 5235, Revised Statutes 1909. Contentions of like nature have been made in the all-too-numerous cases arising under the statute (Sec. 4478) denouncing the offense here charged. As a consequence, almost every phase of objection to proof of this nature

State v. Stemmons.

has been under consideration. The letter of the statute (Sec. 5235), defining the measure of corroboration, is, that it shall be to the same extent as that required of the principal witness in perjury. The reason underlying this statute is that in prosecutions for seduction, as in those for perjury, in the absence of corroboration, it would simply be the oath of the complaining witness against that of the accused, or an oath against an oath, resulting in a counterpoise of testimony, and leaving it doubtful as to where the truth lies. While it is not necessary, in a prosecution for perjury, that there shall be two witnesses to sustain the charge as under the old rule, nor need the corroborative testimony be tantamount to another witness, it must be sufficient to counterbalance the testimony of the accused and thus remove the legal presumption of his innocence. [State v. Richardson, 248 Mo. 563, 153 S. W. 727; State v. Hunter, 181 Mo. 316, 80 S. W. 955; State v. Faulkner, 175 Mo. 546, 75 S. W. 116; State v. Heed, 57 Mo. 252.] Likewise, in prosecutions for seduction, as in the instant case. While the corroborative testimony, required only as to the promise, may consist of circumstances, they must come from other than the prosecutrix. [State v. Long, 257 Mo. l. c. 208.] While it need not be such as standing alone would justify a conviction in a case requiring only the testimony of one witness, it must be at least strongly corroborative of the testimony of the prosecutrix. [State v. Bruton, 253 Mo. l. c. 370.] It is not necessary that such supporting proof shall be the testimony of a witness who heard the promise of marriage, but evidence of the conduct of the parties such as usually accompanies a promise of this character will suffice. [State v. Teeter, 239 Mo. l. c. 487.] Admissions of the defendant, as to the promise, are sufficient. [State v. Long, 238 Mo. 383; State v. Sublett, 191 Mo. l. c. 172.] Continued attentions by defendant to the prosecutrix covering a long period, consisting of frequent visits during which she kept no other company, will sufficiently support her testimony that her ruin was consummat-

ed under a promise of marriage. [State v. Eisenhour, 132 Mo. 140; State v. Brassfield, 81 Mo. l. c. 159.] In short, evidence of material circumstances which usually accompany a marriage engagement, proved by other witnesses, will satisfy the statute. As to what these particular circumstances may be, each case must, to a great extent, be its own guide. [State v. Davis, 141 Mo. l. c. 525; State v. Wheeler, 108 Mo. 658; State v. Hill, 91 Mo. 423.] Proof of preparations made for the marriage by prosecutrix following a continuous courtship, may properly be introduced to corroborate the promise. [State v. Walker, 232 Mo. l. c. 265; State v. Fogg, 206 Mo. 696.] It is not necessary that the promise be made immediately preceding the intercourse; all that is necessary to show is that if made then or previously, defendant thereby accomplished the prosecutrix's seduction. [State v. Brassfield, 81 Mo. l. c. 160.] Guided by these illustrative precedents, are the facts at bar sufficient to bring this case within the requirements of the statute? For a period extending over several months, animated no doubt by that old maxim that "'tis man's province to sue, but woman's to consent," he was unremitting in his attentions to the prosecutrix. During this time he twice promised to marry her. Resting with confidence in the sincerity of his purpose to comply with this promise, she accepted no other suitors; and in hopeful anticipation of her marriage with him she prepared, with her own hands, such articles of household use as the needle of the efficient and industrious woman can fashion. These circumstances disclosed by other than her own testimony, attest the good faith of her reliance on his promise, give corroborative support to her testimony, and cast no uncertain shadow upon the truth of defendant's statements on the witness stand. We overrule this contention.

II. It is urged that proof is lacking to show that the prosecutrix was an unmarried female. We said in State v. Wheeler, 108 Mo. l. c. 664, that it was just as

Unmarried: essential that it appear by evidence that the
Proof. prosecutrix was unmarried, as that she was of good repute, and that such status will not be presumed in the absence of any evidence whatever on that point. In *State v. Reed*, 153 Mo. l. c. 453, reference is made to the rule as announced in this regard in the *Wheeler* case, the court observing in discussing the *quantum* of evidence necessary to sustain a conviction, that it was not absolutely necessary that the fact, that the prosecutrix was at the time of her seduction an unmarried female, be shown by direct and positive testimony; but that it is sufficient if it be shown, like any other material matter necessary to a conviction, by facts and circumstances. In the *Reed* case, there was no direct and positive testimony that the female was unmarried, but it was held that the record disclosed such facts and circumstances as to warrant the jury in so concluding. This holding was approved in *State v. Pipkin*, 221 Mo. l. c. 460. Although this case was lacking in direct evidence of the unmarried condition of the prosecutrix, this court held that her testimony that she had never had intercourse with any one except the defendant was a strong circumstance tending to show her unmarried condition. As further circumstances tending to prove this condition, it was shown that her father's name was Bailey, and that she was addressed throughout the trial as Miss Bailey, and in other terms, indicating that she was single. In *State v. Sutton*, 232 Mo. l. c. 249, testimony similar in all its material features to that introduced in the *Pipkin* case, was held sufficient to prove the single status of the prosecutrix, within the meaning of the statute.

In the case at bar, the prosecutrix testified that she had never had sexual intercourse with any one except the defendant; that he told her if she got into trouble on account of her relations with him, they would marry at once. She bore her parents' name, and was questioned during the trial as "Miss" or as "this girl," or

"that girl," dependent upon the recognition by the examiner of those conventionalities which, while minor, are always characteristic of good breeding. The place and manner of her living, as well as the character of her association with the defendant during all of their acquaintance, is strongly indicative, as are the other circumstances stated, of her unmarried condition. This contention hangs upon the single thread of the lack of an affirmative statement by some witness that the prosecutrix was unmarried. The facts and circumstances tending to show this condition are as convincing in their nature and have as much probative force as those adduced for a like purpose and held sufficient in the cases cited. There was not an intimation to the contrary during the trial. The Supreme Court of Iowa says, in a seduction case, in discussing the *quantum* of evidence necessary to sustain a conviction, that "a cause cannot be reversed on the ground that there was no direct evidence of a material matter, which was throughout the trial assumed to be true." [Egan v. Murray, 80 Iowa, 180.] Putting aside the literal wording of this ruling and construing it to mean that a case "should not be reversed" under the conditions stated, it announces a wholesome doctrine. One, the observance of which, tends to the brushing aside of attenuated contentions and the decision of cases upon substantial facts. In the presence of the facts and circumstances here, sufficiently cogent in our opinion, to satisfy the impartial mind that the prosecutrix, not only at the time of her seduction, but at that of the trial, was an unmarried woman, it is not necessary to invoke the rule thus announced. We hold the contention without merit.

III. The forceful facts in this case, showing the circumstances under which the defendant overcame the prosecutrix, leave nothing on which to base the contention that instead of being seduced within the meaning of the statute, she bartered away her virtue. The Reeves case (97 Mo. l. c. 676), relied on to sustain this contention, presented an altogether

Barter of
Virtue.

different state of facts from those at bar. There, the conditions were, as rather strongly put by the author of the opinion, in the face of the actual facts, "a blunt consent to intercourse in exchange for a promise of marriage." This interpretation of the evidence, while ostensibly directed at the force of the testimony, was, in fact, employed in the discussion of the sufficiency of an instruction, which omitted a prime essential to conviction, viz., that the jury find that the prosecutrix had been "seduced." No such question is here involved, the instructions being immune from error in this regard. The other case to which our attention has been called as an authority to support the contention here made, is that of *State v. Mitchell*, 229 Mo. l. c. 698. The judgment of conviction for seduction was in that case affirmed. The only manner in which the question of the sufficiency of the evidence as to seduction was even referred to was an incidental statement that illicit intercourse permitted by a prosecutrix, as a barter and trade for a promise of marriage, was not seduction, as defined by the statute (Sec. 4478); that arts and blandishments must be brought to the aid of the promise to influence the prosecutrix in yielding to the seducer's desire. The testimony here discloses the bringing into play by defendant of such arts of the seducer as the cases say will constitute seduction. This is enough to bring the case within the purview of the law.

IV. The refusal of Instruction D., asked by defendant, is assigned as error. It is as follows: "The court
Instruction. instructs the jury that in passing upon the evidence and in determining its weight and credibility, it is your duty to scrutinize the testimony of the prosecutrix very closely. For the law assumes that a woman, finding herself pregnant, has the most potent motives to assert that her condition was brought about by a promise of marriage, for very obvious reasons: she must excuse the act to her family, to her friends and to society, and every consideration would impel her to attribute it to deception and betrayal; and

the jury should, therefore, pass upon the weight and credibility of her testimony with these considerations in view." This instruction is argumentative in form, and an improper comment on the testimony of the prosecutrix. It is elementary that an instruction is erroneous which singles out and comments upon any part of the testimony. In the Sublett Case, 191 Mo. l. c. 173, we held that the defendant was not entitled to an instruction which told the jury that the testimony of the prosecutrix must be strongly corroborated by clear proof; and in the Grugin Case, 147 Mo. l. c. 56, it was held sufficient ground for a reversal that an instruction singled out a particular fact for the consideration of the jury. Instruction D. was, therefore, properly refused.

Instruction numbered 3, given at the request of the State, in regard to the evidence necessary to corroborate the prosecutrix as to the promise of marriage, is assigned as error, on the grounds that it is a comment on the evidence, and an assumption of facts not proven, in that the testimony as to her preparations for marriage were not known to defendant, and, consequently, the jury should not have been instructed that such acts might be taken into consideration, as tending to prove a promise. These preparations were established by other than the prosecutrix's testimony. While it is not necessary that they should have been corroborated, as is required of proof of the promise, they are supported by many attending circumstances which attest their truth. Among these may be mentioned the unsullied reputation, or as the books put it, the "good repute" of the prosecutrix; the long term of the parties' social intimacy; his confidence; her fidelity never questioned until the trial; his effort, when he ascertained her condition, to relieve her from the odium of child birth while out of the protecting aegis of wedlock; his payment of her expenses at the maternity hospital; and his statements to her mother in the presence of her father, when asked if he would marry her, that he "had not said he would not." This last fact he denies, but the

Cone v. Donovan.

jury believed their testimony. Present all of these facts, the trial court gave the instruction, authorizing the jury to consider the preparations she was shown to have made for housekeeping, as one of the corroborating circumstances, although it had not been shown that he knew of such preparations. No effort was made by defendant to show that the preparations were not made, nor was their good faith attempted to be questioned. Confronted with all of the supporting circumstances adverted to, it cannot be reasonably concluded that they were intended for other than her contemplated marriage with defendant. The instruction was, therefore, not erroneous. Instructions identical in form so far as the matter here under review is concerned, were approved in *State v. Walker*, 232 Mo. l. c. 265, and *State v. Fogg*, 206 Mo. 696.

The instructions, upon the whole, fully and fairly presented the law in this case under the evidence.

The defendant was awarded a fair trial and the judgment should be affirmed. It is so ordered. All concur.

————— .

SARAH P. CONE, Appellant, v. ELIZABETH DONOVAN et al., Administrators of Estate of JOHN DONOVAN.

Division Two, July 30, 1918.

1. **WILL: Attestation: Knowledge of Witnesses.** There can be no valid attestation of a will unless the attesting witnesses know at the time that the instrument is being made and attested as a will.
2. ———: ———: **Presumption of Knowledge: Genuine Signature.** If the instrument purports on its face to be a will and the signatures of the witnesses are conceded to be genuine and those witnesses, though still living, have forgotten the facts as to such attestation, the law may well presume, in the absence of contrary evidence, that all things connected with its execution and

Cone v. Donovan.

attestation were rightly done, and that the witnesses were informed that the instrument was a will; but such presumption cannot be indulged where the instrument does not purport to be a will; it will not be indulged if the instrument is in the form of a letter, and the maker concealed from his stenographer the name of the alleged legatee and after the balance was written by her he wrote in the beneficiary's name, and after it was signed by him and the two witnesses he placed it in a sealed envelope and wrote on it: "In the event of my death I want this letter to be delivered unopened" to a designated friend, and then placed it in a vault among his papers, where it remained until after his death, twelve years later.

3. ———: ———: ———: **Overcome by Evidence.** Even if the law, in the absence of contrary evidence, will presume that witnesses, whose signatures are conceded to be genuine, were informed by the maker that the instrument, which purports on its face to be a will, was his will, such presumption may be overcome by evidence; and where there is strong evidence to overcome it, the finding of the trial court against the paper will not be disturbed on appeal.

Appeal from Buchanan Circuit Court.—*Hon. Charles H. Mayer, Judge.*

AFFIRMED.

Fred A. Bangs and O. W. Watkins for appellant.

(1) Was the document attested by two competent witnesses who subscribed their names thereto in the presence of the testator? It is not necessary that a will should have any prescribed attestation clause. *Ela v. Edwards*, 16 Gray (Mass.), 91, 92. In the early English case of *Hands v. James*, 2 Comyns, 530, the court held that the presumption arose, upon proof of the signatures of the testator and attesting witnesses, that the will had been duly executed, although the details of the execution were not recited in the attestation clause. To the same effect is *Croft v. Paulet*, 2 Strange, 1109, and the case of *John Johnson*, 2 Curt. 341. These cases have been cited and approved by the courts of this country and by all leading text-book writers without an exception, and the courts of the United States have extended the doctrine to cases where the witnesses have forgotten the details required by the statute,

whether the facts are shown in the attesting clause or not. 1 Greenleaf on Evidence, 38a; 1 Jones on Evidence, sec. 44; 2 Wigmore on Evidence, sec. 1512; 14 Ency. Evidence, sec. 407F; 40 Cyc. 1273-1274; Beach Law on Wills, sec. 39. The later English courts and the courts of the United States have extended this doctrine to apply to a case where the witness has forgotten the facts. *Clarke v. Dunnivant*, 10 Leigh, 13; *Tyler's Estate*, 121 Cal. 405; *Craig v. Craig*, 156 Mo. 362. (2) It cannot be argued that an attestation clause is necessary to the validity of a will, as the rule has always been without any exception, that a will is valid without any attestation clause whatever. 1 *Jarman on Wills* (4 Ed.), sec. 74; The proof of execution of the will in question is purely a matter of evidence. *Tyler's Estate*, 121 Cal. 405; *Burgoyne v. Showler*, 1 Rob. Eccl. 10; *In re. Leach*, 12 Jur. 381. In the case of *Kirk v. Carr*, 54 Pa. 285, the court says: "Want of memory will no more destroy the attestation than insanity, absence or death." *Clarke v. Dunnivant*, 10 Leigh, 13; *Deupree v. Deupree*, 45 Ga. 415; *Ela v. Edwards*, 16 Gray (82 Mass.) 91; *Elliott v. Elliott*, 92 Mass. 357; *Fatheree v. Lawrence*, 33 Miss. 622; *Lawrence v. Norton*, 45 Barber 452; *McKee v. White*, 50 Pa. St. 360; *Barnes v. Barnes*, 66 Me. 286; *More v. More*, 211 Ill. 268; *Woodruff v. Hundley*, 127 Ala. 640; *Tavis v. Richter*, 10 Cal. 466; *Pennell's Lessee v. Wegant*, 2 Har. (Del.) 51; *Mead v. Trustees of Presbyterian Church*, 229 Ill. 526. In the case of *Young v. Banner*, 27 Gratt. (Va.) 96, the court held, l. c. 108: "Surely every reasonable presumption ought to be made in favor of the proper execution of the will," and on page 106, the court says: "Such presumptions are absolutely essential to the protection of property and the security of titles. Were it otherwise the most important and solemn instruments would often fail to take effect by the death, or from the mere failure of attesting witnesses, real or assumed, to recall each and every formality presented for the execution of testamentary papers." *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408; *Gould v. Theological*

Seminary, 189 Ill. 287; Butler v. Benson, 1 Barber, 526; Jackson v. Christman, 4 Wend. 277; Carpenter v. Denoon, 29 Ohio St. 379; Ex Parte Brock, 37 S. C. 348; Webb v. Dye, 18 W. Va. 376.

John E. Dolman for respondents.

(1) Mr. Donovan was a man of intelligence, entrusted with the management of large business affairs, and it is only reasonable to presume that had he intended this letter to be a codicil to his will he would have said so in no uncertain language. He would not have surrounded the execution of it with so much secrecy; he would have informed the witnesses of his intention and would not have directed that the letter be delivered unopened to G. F. Swift, in the event of his death. He would have called it a codicil and not a request, and he would not have called upon Swift to perform this request instead of the executors who undoubtedly he had named in the will to which he referred. That he did not intend this letter to operate as a codicil to his will is clearly shown by his intention not to publish it as such, but to have the letter delivered unopened to Swift, in whom he undoubtedly sought to impose a secret trust to carry out or not as he should think best. That he did not intend it to be a codicil is shown not only by the language of the letter himself, but by the fact that when he destroyed his will he did not also destroy the codicil, or at least if he had intended it to be a will he would, upon the death of Mr. Swift, nearly eight years before his own death, have directed it to some other friend or made some change therein to indicate that he still desired it to operate as a will. (2) A will and a codicil thereto are one instrument, and the testator's intention must be ascertained from the four corners thereof. Middleton v. Dudding, 183 S. W. 443. Griffith v. Witten, 252 Mo. 627; Wells v. Fuchs, 226 Mo. 106. (3) "It is not the mere physical act of signing that the witnesses attest; it is that the instrument signed with the name of the testator is his will."

Cone v. Donovan.

Walton v. Kendrich, 122 Mo. 525. "The witnesses must know that it is the will of the testator and witness it as such." Odenwalder v. Schorr, 8 Mo. App. 467; Withinton v. Withinton, 7 Mo. 589; Cravens v. Faulconer, 28 Mo. 19; Harris v. Hayes, 53 Mo. 90; Norton v. Paxton, 110 Mo. 456; Grim v. Titman, 113 Mo. 57; Ott v. Leonhardt, 102 Mo. App. 43. It is essential that the proper communication be made from the testator to the witnesses so that they may be able to depose to the act having been understandingly done and that the paper is his will. Mittenberger v. Mittenberger, 78 Mo. 27; Bensberg v. Wash. University, 251 Mo. 657. It is essential that it be made to appear unequivocally that the testamentary character of the instrument was communicated to the witnesses by the testator by some word, sign, act or conduct. 40 Cyc. 118, 119; In Matter of Turell, 47 N. Y. App. Div. 560, 62 N. Y. Supp. 1053, 166 N. Y. 330; Robbins v. Robbins, 50 N. J. Eq. 742. Even though the deceased intended the letter in question to be a codicil to his will, the destruction of the will is an implied revocation of the codicil. Woerner Law of Admin., p. 86; Matter of Weston, 115 N. Y. Supp. 1149; 40 Cyc. 1281. (4) The court sitting as a jury having found that the memory of the witnesses was good, that they never signed this letter as a will, and were never informed that it was intended for a will, appellants are concluded thereby. Walton v. Hendrick, 122 Mo. 504; Ortt v. Leonhardt, 102 Mo. App. 38. The presumption of due attestation of a will from a certificate of attestation cannot overcome the positive testimony of the attesting witnesses showing that the statute was not complied with. In re Solomon's Estate, 145 N. Y. Supp. 528; In re Shaffer, 2 How. Pr. (U. S.) 494.

ROY, C.—This is a proceeding to prove a certain instrument as the will of John Donovan, deceased. There was a finding and judgment rejecting said instrument as such will, and the plaintiff has appealed.

275 Mo.—36

The deceased was for many years the vice-president and general manager of the St. Joseph Stock Yards Company, and vice-president of the German-American Bank. He had a wife and daughter. He died in November, 1913, aged about fifty-eight years. The following instrument, except the part in italics, was written at his direction by his stenographer. It was then signed by him and by the witnesses as shown:

“St. Joseph, Mo., December 28, 1901.

“Mr. G. F. Swift, Chicago, Ill.

“Dear Sir:—I did on December 27, 1901, make and execute my will. Upon reflection I have determined to leave enough of the capital stock of the Union Terminal Railway Company to *Mrs. Sarah P. Cone of No 1199 Wilcox Avenue, Chicago, Illinois*, so that the income from the same may bring her the sum of eighteen hundred dollars per year, and I leave to your judgment the amount of stock to be issued for this purpose; the balance of said stock which may be due me shall be issued to my heirs as per my will. I ask that you perform this request as by every sense of right and justice it should be recognized, and I could not further emphasize my desire to have it done.

“Yours Truly, JNO. DONOVAN.”

“Signed in the presence of P. P. WELTY, LOUIS SIEMENS.”

The words in italics were in the handwriting of the deceased.

The stenographer testified that she wrote that instrument on the typewriter, leaving a blank where the italics are, and turned it over to Donovan with such blank unfilled. The witnesses to that instrument were long-trying and trusted employees of the company. They were put on the stand by plaintiff and testified to their signatures and that of the deceased. But they both testified that they had no recollection about the signing of the paper. Welty testified that he never, at any time, witnessed any instrument which he was informed was the will of said Donovan. Siemens testified that he witnessed one instrument and only one which he was in-

Cone v. Donovan.

formed at the time was the will of Donovan, and that the one which he so witnessed was not the one here involved. Both those witnesses testified that they witnessed various documents for Donovan. The stenographer testified that, after that document was witnessed, Donovan sealed it in an envelope on which were the words: "G. F. Swift, Esq., Chicago, Ill. In the event of my death I wish this letter to be delivered upopened to Mr. G. F. Swift," and that it was put in the vault among Donovan's papers, where it remained until after his death.

It is agreed that such endorsement on the envelope was in the writing of the deceased and that Swift died in 1905.

I. There can be no valid attestation of a will unless the attesting witnesses know at the time that the instrument is being made and attested as a will.

Attestation. [Grimm v. Tittman, 113 Mo. 56; Walton v. Kendrick, 122 Mo. 504, l. c. 525; Moore v. McNulty, 164 Mo. 120.]

II. Appellant affirms that where the signatures of the witnesses to a will are conceded to be genuine, and where those witnesses, though still living, have forgotten the facts as to such attestation, the law

Presumption of Knowledge. will presume, in the absence of contrary evidence, that all things connected with the execution and attestation of the will were rightly done, and that the witnesses were informed that the instrument was a will. We will, for the purposes of this case, concede the general rule as claimed. But in this connection we will say that we have been cited to no authority which applies such rule to this kind of a case. In all the cases cited by appellant (we will not here set them out), so far as appears, the instruments purported on their faces to be wills. In such cases the courts could very well presume, in the absence of evidence to the contrary, that the witnesses knew the instruments to be wills. We will not here discuss the question as to whether, under the law, if this instrument were properly

attested, it would be a will. Perhaps it would be. The question in hand right here is whether the law, in the absence of contrary evidence, will presume from the conceded facts that the witnesses understood at the time it was a will. In form at least, it is a letter and not a will. Donovan, after it was attested, sealed it in an envelope and made an endorsement on it, speaking of it as a "letter," and put the seal of secrecy on it not to be broken until his death. He concealed from the stenographer the name which he inserted in that letter. Three facts stand out in bold relief here. He did not want anybody to know what he was doing, the paper was in the form of a letter, and he branded it as a letter. The law cannot, in the face of those three facts, presume that he told the witnesses that it was his will. There is no authority anywhere justifying such a presumption.

III. Even if the law, in the absence of contrary evidence, should raise such a presumption, there is strong evidence here to overcome such presumption. Both the witnesses had at various times witnessed instruments for Donovan. Neither of them remembered anything about attesting this instrument. But Welty testified that he did not at any time attest an instrument which he was informed was Donovan's will. Siemans testified that he never had witnessed but one instrument as Donovan's will, and that the one thus witnessed was not the one here involved. The trial court doubtless considered that evidence as strongly supported by the three facts above mentioned. Anyway, that was a question for the trial court on the weight of the evidence.

The judgment is affirmed. *White, C.*, concurs.

PER CURIAM.— The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

WILLIAM A. BARBER v. JOSEPH NUNN et al.,
Appellants.

Division Two, July 30, 1918.

1. **JURISDICTION:** Lewis County: Circuit Court at Canton. In view of the previous decisions of this court it is *held* that the circuit court at Monticello has original jurisdiction of a suit to set aside a deed to land lying "east of the range line between ranges 6 and 7."
2. **FRAUDULENT CONVEYANCE: Purpose: Payment of Consideration.** The purpose of an ante-dated conveyance by a cotenant, against whom suit had been brought by a neighbor for alienating his wife's affections, to his two brothers, may be deduced from a survey of all the facts connected therewith. And if they show a purpose on the grantor's part to put the property beyond the reach of an execution which might follow an apprehended judgment, the conveyance was fraudulent on his part; and if the grantees accepted the deed with a knowledge of his fraudulent purpose, and with the intent to assist him in the perpetration of the fraud, it was a fraudulent transaction on their part, and the deed should be set aside at the suit of the judgment creditor, notwithstanding the grantees may have paid the grantor what the property was worth.
3. ———: ———: **Facts for Consideration.** And in determining whether fraud existed on the part of both grantor and grantee, the court is authorized to take into consideration their relationships to each other, the manner in which their business was conducted both before and after the deed was made, and the continued exercise of authority of the grantor over the property after the execution of the deed.
4. ———: **Failure to Testify.** Where the petition directly charges fraud against the grantees and grantor of a deed, their unexplained failure to appear and testify is to be regarded as a strong circumstance against them, whether they were subpoenaed by plaintiff or not.

Appeal from Lewis Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

Hilbert & Henderson, A. F. Haney, and M. C. Schofield for appellants.

(1) The court had no jurisdiction of the subject of the action, since the cause of action alleged in the petition was for the purpose of setting aside a deed to land situated in that part of Lewis County east of the range line between ranges six and seven, thereby giving the circuit court at Canton exclusive jurisdiction of the action. Laws 1897, p. 60. The use of the word "exclusive" in a statute defining the jurisdiction of a court has the effect of taking away the jurisdiction of every other court. *Tackett v. Vogler*, 85 Mo. 483; *State ex rel. v. County Court*, 38 Mo. 408. In such case, the suit is to be regarded as falling within a class of cases over which the court has no jurisdiction, and constitutes a want of jurisdiction over the subject-matter of the suit. *Ensworth v. Holly*, 33 Mo. 372; *State ex rel. v. Muench*, 225 Mo. 210. (2) The finding and judgment of the trial court that the deed of conveyance in controversy herein was fraudulently executed, delivered and accepted by the parties thereto is unsupported by the evidence in this cause. "In order for the creditors of the grantor to defeat the deed for fraud it was incumbent on them to prove that it was made by the grantor with a fraudulent intent and that the grantee had notice of such intent when he purchased." *Robinson v. Dryden*, 118 Mo. 534; *Southern Bank v. Nichols*, 202 Mo. 320. "In order to defeat the title of a purchaser from one who conveys lands with a fraudulent intent, the vendee must have notice of such intent or participate in the fraud." *Henderson v. Henderson*, 55 Mo. 535; *Amos v. Gilmore*, 59 Mo. 543. See also *Gust v. Hoppe*, 201 Mo. 298. "The rule is that fraud must be proved and cannot be presumed, and, if the facts shown are all consistent with an honest purpose, honesty in the transaction should be inferred." *Robinson v. Dryden*, 118 Mo. 539; *Amos v. Gilmore*, 59 Mo. 543; *Henderson v. Henderson*, 55 Mo. 555. Mere suspicion is not sufficient. The fraud must be

proved as an affirmative fact, and the proof must be of such a positive and definite character as to convince the mind of the chancellor, for it is never presumed, and if the facts shown all consist as well with honesty as with fraud, the transaction should be held honest." *Farmers' Bank v. Worthington*, 145 Mo. 100; *Bump on Fraudulent Conveyances* (2 Ed.), p. 584. "Where there is a valuable consideration for a transfer, no matter how trivial or inadequate it may be, the conveyance is not voluntary, and therefore not presumptively fraudulent. In such cases, actual intent to defraud must be found as a fact in order to defeat the conveyance." *Commercial Bank v. Kuechner*, 135 Mo. App. 63; *Robinson v. Dryden*, 118 Mo. 539; *Ettlinger v. Kahn*, 134 Mo. 497; *Link v. Hathway*, 143 Mo. App. 502.

J. G. Trimble, E. A. Dowell and Richard J. McNally for respondent.

(1) Circuit courts are created by the Constitution—not by the Legislature—and laws attempting to limit or control their constitutional powers are void. Constitution, art. 6, sec. 22; *Chicago Ry. v. Gildersleeve*, 219 Mo. 170. The Act of 1897, providing for holding two terms of the Lewis County Circuit Court at Canton, did not create a new court, nor did it interfere with the Circuit then existing, composed of the counties of Lewis, Clark, Knox and Scotland. The words in that act (Sec. 3) "original and exclusive" are "super-erogation," and the Act does not deprive the circuit court sitting at Canton of its constitutional jurisdiction. *State v. Hall*, 189 Mo. 262; *State v. Sublett*, 191 Mo. 163. The act providing for holding two terms of the court at Canton did not deprive the circuit court sitting at Monticello of its jurisdiction. *State v. Vickers*, 209 Mo. 30. (2) Defendant Joseph's manifest purpose was to put his property out of the reach of the execution of a judgment which he had reason to believe would be obtained against him. The evidence is that the grantees not only had notice of this purpose, but

actively aided in the details leading to its consummation, for one of the grantees asked the justice to write the quitclaim deed, and to antedate it. And it is also shown that after several years of partnership relations among them, Joseph was suddenly dropped from the firm when a damage suit was instituted against him. *Sharp v. Cheatham*, 88 Mo. 498; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 147; *Stivers v. Horne*, 62 Mo. 473; *Gust v. Hoppe*, 201 Mo. 298. (3) The defendants are brothers, and the fact of such relationship should be considered in connection with other circumstances, on the question of intent to defraud Joseph's creditors. *Van Raalte v. Harrington*, 101 Mo. 602; *Robinson v. Dryden*, 118 Mo. 534; *First National Bank v. Frey*, 216 Mo. 42. (4) The continued possession of real property by the vendor is a circumstance to show fraud. *Steward v. Thomas*, 35 Mo. 202; *Dickson v. Kempinsky*, 96 Mo. 252. (5) "Where the petition distinctly charges fraud upon a defendant, his unexplained failure to appear and testify will be regarded as a strong circumstance against him; and this whether subpoenaed by the adverse party or not." *Mabary v. McClurg*, 74 Mo. 575; *Conn. Mut. Life Ins. Co. v. Smith*, 117 Mo. 261.

WALKER, P. J.—This is an action brought in the circuit court of Lewis County to set aside a deed. Upon a trial before the court without a jury, there was a judgment for plaintiff, from which defendants have appealed.

This case had its origin in an effort on the part of the plaintiff to secure satisfaction of a judgment theretofore obtained by him against one of the defendants, Joseph Nunn, the facts concerning which are briefly as follows:

On July 27, 1912, plaintiff brought suit against Joseph Nunn, charging him with having alienated the affections of the plaintiff's wife. A few days thereafter, while Joseph Nunn was at work with his brothers, who are the other defendants, he was served with summons in

Barber v. Nunn.

the alienation suit. The brothers were aware of the nature of this action, and of the service of summons upon him. He took a change of venue to Marion County, where a judgment was rendered against him for \$1500, from which he prosecuted no appeal. Execution was issued on this judgment, and certain of Joseph Nunn's property was levied on and sold, and the amount derived therefrom, less the expenses of the proceeding, was credited on the judgment, leaving the greater portion of the judgment unsatisfied. Other than his interest in the land here involved, he had no property. The action at bar was thereupon brought to set aside a deed which had been made by defendant, Joseph Nunn, on the 27th day of August, 1912, to his brothers, Henry and Reason Nunn, the other defendants, to his undivided one-third interest in a certain tract of land which had descended by operation of law to the three brothers from their father. This instrument was a quit-claim deed, importing a consideration of \$3333.33, and was written, signed and acknowledged, as shown by the date of its execution, August 27, 1912, or about a month after the institution of the damage suit against Joseph Nunn. In the body of this deed it was, at the request of one of the grantees, ante-dated by the scrivener, as having been written March 4, 1912. The defendants lived together and are jointly associated in their interests and business enterprises. This condition existed before and after the making of the conveyance. They kept joint bank accounts, except as hereinafter stated, and each at all times, entertained a like dominion over the land described in the deed. This conveyance is sought to be set aside on the ground that it was without consideration, and was executed for the purpose of hindering, delaying, and defrauding the creditors of Joseph Nunn; that it was known by the grantees at the time of its execution to have been so made. Defendants offered no testimony at the trial, but in their depositions taken sometime prior thereto, they stated that they had paid Joseph Nunn the full amount named as the consideration in the deed. These

are, in the main, the general facts in regard to the circumstances under which the conveyance was made. Others will be referred to in discussing the sufficiency of the evidence to sustain the judgment of the trial court.

I. The first contention made by the defendants is that the trial court was without jurisdiction to hear and determine this case. Circuit courts are authorized under the law, to be held at two different places **Venue.** in Lewis County, viz., under the general law, at Monticello, the county seat, and at Canton, under a special act, approved March 5, 1897 (Laws 1897, p. 60). This act provides, under Section 3 of same, first: "That the circuit court held at Canton shall have original and exclusive jurisdiction in all civil cases, either in law or equity, arising in that part of Lewis county lying east of the range line between ranges six and seven." - A subsequent paragraph of the same section provides that "said court shall have original and concurrent jurisdiction in both civil and criminal cases."

The instant case "arises," to employ the language of the act, "in that part of Lewis county lying east of the range line between ranges six and seven." It is contended, therefore, that it should have been commenced at Canton instead of at Monticello, and, as a consequence, that the court was without authority to hear and determine the same. While the initial paragraph of said Section 3 attempts, according to a literal interpretation of its terms, to confer original and exclusive jurisdiction as therein stated, this court has held that the language as thus employed was an act of supererogation, and that it was not intended thereby to do more than as is provided in a succeeding part of the same section, viz., to give the circuit court held at Canton like jurisdiction within the limit of the statute, to that given the circuit court when held at Monticello; and that the jurisdiction conferred by the general law upon the circuit court at Monticello was

Barber v. Nunn.

in no wise curtailed by the seeming exclusive provisions of the said Act of 1897. [State v. Vickers, 209 Mo. l. c. 29; State v. Sublett, 191 Mo. l. c. 176; State v. Hall, 189 Mo. l. c. 267.] Other than as attempted to be limited by the Act of 1897, no question is made as to the jurisdiction of the circuit court. This contention of the appellants is, therefore, overruled.

II. There remains only the contention that the evidence did not support the judgment. In addition to the general facts heretofore stated, it appears that within a month of the filing of the suit for damages by plaintiff against the defendant, Joseph Nunn, said deed was made by him to his brothers, the other defendant, for his undivided interest in the land he and they had inherited. This deed, made at the request of one of the grantees, was ante-dated, on the ground that its making had been agreed on sometime before. The scrivener ante-dated it in the body of same, as requested, but inserted in the acknowledgment the actual date of the making and execution of the same, to-wit, August 27, 1912. The consideration he was directed to place in the deed is shown to have been largely in excess of the value of an undivided one-third of the land. No explanation of this excessive valuation is attempted. The evidence as to the manner in which the payment of this consideration was made is in the most general terms, and it was stated in defendants' depositions to have been paid by the surrender of a note by the grantees to Joseph Nunn, theretofore given them; for what purpose no reason is stated, nor is the amount given, except by implication, in that they paid Joseph \$1800 in currency, which they had gotten from the sale of a mine at Joplin. After the purported sale of the land, the three brothers continued to occupy, control and cultivate it as before. Subsequent to the making of the deed a party desired to rent a portion of the land, and upon making inquiry of Joseph, in regard thereto, he said: "We have a place which we might rent to you." So far as the record discloses, the defendants neither owned

jointly nor severally any other than the land here involved. Before the bringing of the damage suit the defendants kept a joint bank account, and each checked on same; subsequent thereto, the bank was directed to change the account to that of Reason and Henry Nunn, but despite the omission of Joseph Nunn's name from the account, he checked upon the same, as before, and his co-defendants and the bank recognized his authority so to do. That these amounts were small does not obliterate the fact that ownership was thereby manifested, and that his right to exercise same was approved by those who had the authority to question it. The purpose of this conveyance may be deduced from a survey of all the facts connected therewith. If these show a purpose on the part of the grantor in making this conveyance to put the property conveyed out of the reach of an execution which might follow an apprehended judgment, then it constituted a fraudulent transaction on his part; and if the grantees accepted the deed with a knowledge of the fraudulent purpose of the grantor, and with the intent to assist him in the perpetration of this fraud, notwithstanding they may have paid the grantor what the property was worth, it constituted a fraudulent transaction on the part of both parties, and the sale should be set aside. [Gust v. Hoppe, 201 Mo. l. c. 298.] The triers of the facts so found in this case.

In this finding, we are authorized in presuming that the court, in addition to the force of the affirmative facts themselves, took into consideration, as it was authorized to do, the relationship of the parties, the manner in which their business was conducted before and after the deed, and the continued exercise of authority of Joseph Nunn over the property after the deed was made, in determining as to the existence of fraud. [First National Bank v. Frey, 216 Mo. l. c. 42; Robinson v. Dryden, 118 Mo. 534; Van Raalte v. Harrington, 101 Mo. 602; Sharp v. Cheatham, 88 Mo. 498; Ridgeway v. Holliday, 59 Mo. 444; Stoffel v. Schroeder, 62 Mo. 147; Stivers v. Horne, 62 Mo. 473; Dickson v.

Kempinsky, 96 Mo. 252; Stewart v. Thomas, 35 Mo. 202.] In addition, where a question of fraud is involved, any unusual clause in an instrument or unusual method of conducting business apparently done to give the transaction an air of honesty and good faith is of itself a badge of fraud. [State to use v. O'Neill, 151 Mo. l. c. 67; Snell v. Harrison, 104 Mo. 158; Baldwin v. Whitcomb, 71 Mo. 651.] We have adverted to the fact that defendant failed to take the stand and offer any evidence in their own behalf. Where, as in this case, the petition directly charges fraud upon defendants, their unexplained failure to appear and testify will be regarded as a strong circumstance against them; and this, whether subpoenaed by the adverse party or not. [Marbary v. McClurg, 74 Mo. 575; Conn. Mut. Life Ins. Co. v. Smith, 117 Mo. 261.]

Under the state of facts, therefore, disclosed by this record, we have reached the conclusion that the evidence is ample to show that the transaction was fraudulent, and we, therefore, decline to interfere with the finding of the trial court.

This results in an affirmance of this judgment, and it is so ordered. All concur.

ELIZABETH KOEHLER and AUGUST KOEHLER,
Her Husband, Appellants, v. LEONARD N. ROW-
LAND et al.

Division Two, July 30, 1918.

1. **QUIETING TITLE: Character of Action: Pleading.** The character of an action brought under Section 2535. Revised Statutes 1909, is determined by the issues which the pleadings raise. If they present issues of equitable cognizance the action becomes a suit in equity, but a straight action under the statute, in the terms of the statute, is an action at law.
2. **———: ———: Converted by Answer: Affirmative Equitable Relief.** Where the petition in a suit brought under Section 2535 states an

action at law, an answer which sets up an equitable defense and asks affirmative relief converts the action at once into a suit in equity, so that the rules of equity apply; but the setting up of an equitable defense does not so convert the action unless affirmative equitable relief is prayed.

3. ———: ———: **Forfeiture: No Prayer for Affirmative Relief.** Where the petition follows Section 2535 substantially in the allegations of plaintiffs' rights and the defendants' claim, and prays the court to hear and determine all the rights, claims and interests whatsoever of the parties, to adjudge and decree that plaintiffs are the owners and to award them possession, and the answer, after stating reasons why a certain condition named in defendants' deeds should not work a forfeiture of their title, prays the court to adjudge that plaintiffs "have no right, title or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper," it does not contain a prayer for affirmative equitable relief, and the action is not, therefore, converted into a suit in equity, but remains an action at law.
4. ———: **Findings of Trial Court: Binding On Appeal.** If the suit brought under Section 2535 is an action at law, the findings of the trial court, if supported by substantial evidence, are binding on the appellate court.
5. **CONVEYANCES: Condition: Occupation by Negroes.** Where the deed contained a condition that the property "shall not be sold, leased or rented to negroes," a breach is shown if a part of the building on the lot was leased to negroes, the intention of the restriction being to prevent negroes from coming on the premises as tenants; and the deeds must be interpreted in accordance with that manifest intention, as gathered from them as a whole.
6. ———: **Restrictive Sale or Use: Forfeiture.** Forfeiture is a harsh remedy and where a stipulation in a deed can be construed as a mere restrictive covenant and not a condition, so as to avoid a forfeiture, it will be so construed; and the question is to be determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object in view; but where the language is unmistakable, particularly where there is a provision for re-entry upon a breach of the condition, or where the right to re-enter is plainly implied, it is a forfeiture.
7. ———: **Sale or Lease to Negroes: Forfeiture.** The deed contained a condition that the "above described property shall not be sold, leased or rented to any negroes for twenty-five years from date hereof, and in event of such transfer, lease or rental before the expiration of said term, said property shall revert to grantor or

Koehler v. Rowland.

sellors without process of law or equity." *Held*, to provide, in perfectly clear language, for a forfeiture on breach of condition and for a re-entry; and if not clearly expressed, forfeiture is implied in the language used. Such condition does not come within the rule prohibiting restraints upon alienation.

8. ———: ———: **Restraint Upon Alienation.** It is within the right and power of a grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes.
9. ———: ———: **Public Policy.** A condition in a deed that the property is not to be "sold, leased or rented to negroes for twenty-five years" is not void as against public policy. The purpose of the restriction being to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes, it comes within the rule that conditions in deeds which prohibit the use of property for certain purposes, in order that it may become more desirable as places of residences for families, are valid.
10. ———: ———: **Perpetuities.** A stipulation in a deed whereby the title is to revert to the grantor upon entry for breach of a condition subsequent, is not within the rule against perpetuities. The courts will not refuse to enforce a forfeiture for a breach of a condition in a deed that the property was not to be "sold, leased or rented to negroes for twenty-five years from date," on the ground that the condition violates the rule against perpetuities, although the event upon which forfeiture might be declared might occur after every one in interest was dead and more than twenty-one years and ten months thereafter had elapsed.
11. ———: ———: **Change in Conditions: Question of Fact.** If the purpose of a condition in a deed declaring that the property "shall not be sold, leased or rented to negroes" can no longer be accomplished, owing to changed circumstances, such as the growth of the city and the present use by negroes of the whole neighborhood, and it would be oppressive and inequitable to give effect to such condition, it will not be enforced; but where the evidence as to such changed circumstances is conflicting, the appellate court will accept the finding of the trial court that there had been no such change, as conclusive in a law case, and will not refuse to enforce the condition on such ground.
12. **QUIETING TITLE: Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him entitled to possession and to award a writ of pos-

Koehler v. Rowland.

session in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession.

13. ———: ———: **Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to defendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property."

Appeal from Jackson Circuit Court.—*Hon. Allen C. Southern*, Judge.

REVERSED AND REMANDED (*with directions*).

Gage, Ladd & Small for appellants. .

(1) There is nothing against public policy in inserting a condition in a deed that the property shall not be sold or leased to colored people. Such restrictions, tend to promote peace and to prevent violence and bloodshed, and should be encouraged. The courts have sustained laws providing for separate schools for negroes and separate coaches on railroad trains, and even in street cars, and laws prohibiting negroes from attending theatres attended by white people and segregating negroes and whites in cities. The covenants contained in this deed are perfectly reasonable, lawful and binding. *Plessy v. Ferguson*, 163 U. S. 537; *Buchanan v. Worley*, 165 Ky. 559, 177 S. W. 472; *State v. Gurry*, 121 Md. 534; *Keltner v. Harris*, 196 S. W. 1. (2) That conditions in the neighborhood may have changed is wholly immaterial and in no way impairs the validity or force of the conditions or restrictions in a deed. *Thompson v. Langan*, 172 Mo. App. 83; *Spahr v. Cape*, 143 Mo. App. 114; *Noel v. Hill*, 158 Mo. App. 426. (3) The provisions in plaintiffs' deed to Waters, not only prohibited the use by or sale of the property to negroes, but expressly provided

that if such sale or use was made "the property should revert" to Mrs. Koehler, "without any process of law or equity." Upon violation of the conditions, which are conditions subsequent, the title therefore, vested *ipso facto* in Mrs. Koehler, and the house or improvements, being fixtures and a part of the land, reverted with the land to the plaintiffs. *Ellis v. Kyger*, 90 Mo. 600; *O'Brien v. Wagner*, 94 Mo. 93; *Brooks v. Gaffin*, 192 Mo. 253; *St. Louis Ty. Co. v. Curtis*, 167 S. W. 489, (expressly in point as to improvements). (4) If re-entry was necessary under the law in this State the bringing of an action in ejectment is equivalent to and obviates the necessity of re-entry for condition broken. *Ellis v. Kyger*, 90 Mo. 606; *O'Brien v. Wagner*, 94 Mo. 96; *Brooks v. Gaffin*, 192 Mo. 253. The statute relating to quieting title, Section 2535, R. S. 1909, expressly permits legal and equitable relief in the same proceeding, and in this case we have not only asked for a decree quieting title, but for possession; which makes the suit, in effect, the same as a suit in ejectment and does away with the necessity of re-entry for condition broken, the same as a suit in ejectment. (5) The rights of the plaintiffs being legal rights, and not equitable, this is a suit at law so far as the plaintiffs are concerned. *Lee v. Conran*, 213 Mo. 404; *O'Brien v. Wagner*, 94 Mo. 94; *Ellis v. Kyger*, 90 Mo. 600; *Clarke v. Brookfield*, 81 Mo. 503. This is not a suit to enforce a forfeiture. There is no affirmative action necessary on the part of the court to declare a forfeiture in order to establish plaintiffs' rights, because their deed expressly states that the title shall revert to them "without any process of law or equity." Authorities under point 4. No law prevents parties, competent to contract, from making such contract; nor does it contravene public policy. *Brooks v. Gaffin*, 192 Mo. 253; *Brooks v. Gaffin*, 196 Mo. 351; *Smith v. Eagle Coal and Merchantile Co.*, 170 Mo. App. 27.

Maurice H. Winger, S. J. McCulloch and New Mielor, Camack & Winger for respondents.

(1) The evidence fails to show that the condition in the deed has been broken. 1 Jones on Real Property, sec. 679; Sheppard's Touchstone, p. 133; 2 Washb. on Real Property (5 Ed.), 7; 2 Dev. on Deeds (3 Ed.) sec. 970; 8 Ruling Case Law, p. 1110, sec. 171; Studdard v. Wells, 120 Mo. 25; Gratz v. Railroad Co., 165 Mo. 211; Catron v. Collegiate Institute, 264 Mo. 713; St. Peter's Church v. Bragaw, 144 N. C., 126; Moore v. Trust Co., 173 Mo. 218; 2 Underhill on Landlord & Tenant, sec. 789, p. 1343. (2) The condition in the deed executed by the plaintiffs, providing that, in the event of a sale, lease or rental to negroes within twenty-five years, the property should revert to the grantor, is void: (a) It is an unlawful restraint on the power of alienation incident to a fee-simple title. McDowell v. Brown, 21 Mo. 57; Kessner v. Phillips, 189 Mo. 515; Weatherford v. King, 119 Mo. 57; Jones v. Port Huron Co., 171 Ill. 502; Bennett v. Chapin, 77 Mich. 526; Wood v. Kice, 103 Mo. 335. (b) The condition is void because it violates the rule against perpetuities. 30 Cyc. 1467; Lockridge v. Mace, 109 Mo. 162; Gray, Rule against Perpetuities, sec. 214, p. 151; 2 Sharswood & B. Leading Cases on Real Property, 487; Gates v. Seibert, 157 Mo. 254; Shepard v. Fisher, 206 Mo. 239. (c) The condition is void as against public policy. Kitchen v. Greenbaum, 61 Mo. 115; Montgomery v. Montgomery, 142 Mo. App. 486; United States v. Norris, 125 Fed. 322; Gandolfo v. Hartman, 49 Fed. 181. (3) Even if the court should rule that the condition in the deed is not void as being a restraint upon the power of alienation and as being in violation of the rule against perpetuities, or as against public policy, it is not within the province of a court of equity to enforce a forfeiture for condition broken, but it is within the power of a court of equity to relieve against such forfeitures where the forfeiture would be unjust and inequitable. (a) A court of equity has no jurisdiction to enforce a forfeiture.

Moberly v. Trenton, 181 Mo. 637; Spies v. Avondale Co., 60 W. Va. 389; John v. McNeal, 167 Mich. 148; Douglas v. Ins. Co., 121 Ill. 101. (b) A court of equity has power to relieve against a forfeiture. Moberly v. Trenton, 181 Mo. 646; Towne v. Bowers, 81 Mo. 491; Messersmith v. Messersmith, 22 Mo. 369; Abraham v. Stewart, 83 Mich. 10; Noyes v. Anderson, 124 N. Y. 175; Watson v. Grass, 112 Mo. App. 621. (4) In view of the changed conditions of the neighborhood in which the property in question is situated, the very purpose of the condition fails of accomplishment and to enforce such a condition would be most inequitable, unjust and oppressive; and in view of the facts and conditions in general it would be inequitable and oppressive to enforce a forfeiture. Abraham v. Stewart, 83 Mich. 7, 10; Messersmith v. Messersmith, 22 Mo. 372; Jackson v. Stevenson, 156 Mass. 496; Scharer v. Pantler, 127 Mo. App. 433; Evertsen v. Geitenberg, 186 Ill. 344; Jackson v. Stevenson, 156 Mass. 496, 28 L. R. A. (N. S.) 715; Trustees v. Thatcher, 87 N. Y. 311. (5) The court erred in any event in failing to allow any compensation for improvements made on the premises by the defendants, and it was proper to sustain the motion for new trial on that ground. Ritchie v. Railway Co., 55 Kan. 58; R. S. 1909, sec. 2401; Railroad Co. v. Shortridge, 86 Mo. 662; Huff v. Price, 50 Mo. 228; Shroyer v. Nickell, 55 Mo. 264.

WHITE, C.—The plaintiffs brought this suit under Section 2535, Revised Statutes 1909, to determine the title to Lot 15, Block 2, Wirtman Place, an addition to Kansas City. The plaintiff Elizabeth Koehler and her brother, George Wirtman, were at one time owners of all the property in blocks 1 and 2 in Wirtman Place. In conveying this property in 1905 to Henry Waters, plaintiffs inserted the following condition in their deed:

“This transfer is made subject to the following conditions, to-wit: It is agreed between the parties hereto, their assigns and executors, and is made a part

of this condition and consideration of this transfer, that above described property shall not be sold, leased or rented to any negro or negroes for twenty-five years from date hereof and in event of such transfer, lease or rental before expiration of said term of twenty-five years, said property shall revert to grantor or sellers without process of law or equity."

The defendants Louis N. Rowland and William N. Rowland acquired the property through mesne conveyances from the plaintiffs' grantee, and their deed stipulates that it is made subject to conditions and restriction contained in the deed to Waters. Deeds were introduced showing plaintiffs and George Wirtman conveyed other property in the same block and in Block 1, with the same restrictions. John B. Groves, trustee for the Groves Brothers Real Estate & Mortgage Company, and the Mortgage Company filed a separate answer setting up a deed of trust which the said Real Estate & Mortgage Company held on the property executed by the defendants Rowland. The defendants Rowland filed a separate answer. The defendants Fisher and Thompson were negroes—tenants of the defendants Rowland—and occupied a part of the property in dispute; they filed no answer in the case.

The circuit court rendered a judgment for the plaintiff in which it found that the defendants Louis N. Rowland and William H. Rowland had acquired the property subject to the conditions mentioned, that the said deed of trust was subject to the same conditions, that the conditions had been breached, that the defendants Rowland had been duly notified of the conditions of the said deed and requested to remove their negro tenants from the premises and failed to do so. The court then adjudged that the plaintiffs were the owners in fee simple, clear of all claims, that the defendants had no right, interest, lien or claim in said property, and that the plaintiffs were entitled to possession, and ordered a writ of ouster directing the sheriff to deliver possession to the plaintiffs. Separate motions for new trial were filed by the several answering defendants.

The court sustained these motions, giving this reason in the order sustaining each motion:

"The facts found in the court's decree being true, nevertheless the court erred in its conclusion of the law; defendants are entitled to compensation for improvements on the property."

The plaintiffs thereupon appealed from the order granting a new trial. Other facts will be noticed in considering the points involved.

I. At the outset it is important to settle the character of this action. Respondents assuming that it is an equitable proceeding, very correctly argue that a court of equity will not enforce a forfeiture while it may relieve against one. It has been settled by this court that the character of an action brought under Section 2535 is determined by the issues which the pleadings raise. [Lee v. Conran, 213 Mo. 404; Hauser v. Murray, 256 Mo. 58, l. c. 84-5; Minor v. Burton, 228 Mo. 558.] If the pleadings present issues of equitable cognizance, then it becomes a proceeding in equity. But a straight action under this statute, in the terms of the statute, is a suit at law. The petition in this case follows the statute substantially in the allegations of the plaintiffs' rights and the defendants' claim, prays the court to hear and determine all the rights, claims and interests whatsoever of the parties to the proceeding, to adjudge and decree that the plaintiffs are the owners and award plaintiffs the right of possession. The petition thus states purely an action at law.

Where the petition states an action at law, if the answer sets up an equitable defense and asks affirmative relief, it converts the suit at once into a suit in equity, so that the rules of equity apply. But the setting up of an equitable defense does not convert the case into a proceeding in equity unless affirmative equitable relief is prayed. [Kerstner v. Vorweg, 130 Mo. 196, l. c. 199; Carter v. Prior, 78 Mo. 222, l. c. 224; Brooks v. Gaffin, 192 Mo. 228, l. c. 253; Kansas City v. Smith, 238 Mo. 323, l. c. 334; Withers v. Railroad, 226 Mo. 373, l. c. 396.]

The answer of defendants Rowland set up the condition in the deed above mentioned and alleged facts which they claimed would prevent the occurrence of the forfeiture. They alleged that since the deed was made the conditions surrounding the neighborhood had so changed that the reasons for inserting that clause in the deed had ceased to exist, and therefore the consideration for such stipulation had wholly failed, and the plaintiffs were not damaged by the breach of the condition. The answer did not then ask affirmative equitable relief, but followed the language of the statute substantially and prayed the court to adjudge that the plaintiffs "have no right, title or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper."

The effect of this pleading was to pray the court to ascertain the title and enter a decree adjudging it *as ascertained*; that is, to find out who *had* the title and enter such judgment as that finding warranted. If the condition in the deed was broken plaintiffs had title; otherwise, the title remained in defendant. The title would be affected by the *facts* and not by any decree of the court.

The case being purely an action at law, the findings of the trial court, if supported by substantial evidence, are binding upon this court.

II. The respondents assert that the evidence failed to show that the conditions of the deed were broken. The argument runs in this way: The condition provides "that the above described property [Lot 15, Block 2] shall not be sold, leased or rented to negroes;" whereas the proof shows that negroes occupied only an apartment in a flat building on the site, therefore, it could not be said that, "the above described property," Lot 15, Block 2, was leased to negroes, because at most they leased only a part of it. Much evidence was introduced showing there were negro

**Partial
Occupation.**

Koehler v. Rowland.

tenants in the premises, without any definite showing as to how far their occupancy of the premises was restricted, or to what extent the tenants may have controlled the entire lot. Doubtless the intention in inserting the restriction in plaintiffs' deed was to prevent negroes from coming on the premises as tenants. It must be considered with that in view. The narrow and technical construction suggested by respondents, as against such manifest intention, would not accord with the decisions of this court in considering and passing upon the spirit and purpose of instruments of this character. [Sims v. Brown, 252 Mo. 58; Garrett v. Wiltsee, 252 Mo. 699, l. c. 707; Mott v. Morris, 249 Mo. 137.] If the grantors fail to express their contract with completeness and precision, but the intention, nevertheless, clearly appears from the instrument; if its spirit and purpose are manifest from a consideration of the instrument as a whole, it will be given an interpretation in accordance with such intention. The answer of defendants alleges "that the original intent, purpose and object of inserting said provision was to preserve the property described therein, together with other property in the neighborhood . . . as a district unoccupied by negroes." The answer then asserts that the conditions have so changed that there ceased to be any consideration for the condition, so that the grantor, plaintiff, was not damaged by the breach. This is a clear admission in the answer that the intention as expressed by its terms was to prevent any occupancy by negroes of the property described. The insertion of the words "or any part thereof" in the instrument would not have made that intention clearer. The trial court found that the premises were occupied by the tenants of the defendants Rowland in violation of the condition in the deed, and the evidence is entirely sufficient to support that finding. Hence we conclude that there was a breach of the condition which would work a forfeiture of the defendants' title if the condition is a valid and enforceable one.

III. We come now to consider the character and effect of the condition in the deed. The plaintiffs, before filing their suit, notified the defendants **Forfeiture.** in writing to comply with the condition and remove the negroes, but the notice was not heeded.

Forfeiture is a harsh remedy and where a stipulation can be construed as a mere restrictive covenant and not a condition, so as to avoid a forfeiture, it will be so construed. The question is determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object in view. [Union Stock Yards Co. v. Nashville Packing Co., 140 Fed. 701.] But where the language is unmistakable, particularly where there is a provision for re-entry on breach of the condition, or where the right to re-enter is plainly implied, it is a forfeiture. Where the forfeiture is expressly reserved and the right of re-entry is not explicitly stated but is a necessary incident to the forfeiture, it will be implied; and in all such cases the stipulation is construed to be a forfeiture. [Berry on Restrictions on the Use of Real Property, pp. 77-8; Rudick v. St. Louis, Keokuk & N. W. Ry. Co., 116 Mo. l. c. 31; Brooks v. Gaffin, 196 Mo. l. c. 357, 192 Mo. l. c. 228; Smith v. Mercantile Co., 170 Mo. App. l. c. 34.] The language in this case is perfectly clear in providing for a forfeiture on breach of the conditions, and the re-entry for condition broken; if not clearly expressed, is implied in the language used. It is apparent that in case of sale and conveyance to objectionable parties covered by the restriction, there would be hardly an adequate remedy except by forfeiture.

Respondent asserts that it is an unlawful restraint upon the power of alienation incident to a fee simple title. All the cases cited by respondent in support of the position, are where there is a stipulation **Restraint upon Alienation.** directly prohibiting alienation. It is the rule that an absolute restriction in the power of alienation in the conveyance of a fee simple title is void, but it is entirely within the right and power of the grantor to impose a condition or restraint upon

the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. [Cowell v. Springs Co., 100 U. S. 55; Devlin on Real Estate, sec. 965.]

The condition in the deed under consideration does not come within the rule prohibiting restraints upon alienation.

IV. It is further claimed that the condition is void as against public policy. The courts usually have upheld conditions and restrictions in deeds of property which prohibit the use of the property for certain purposes. **Public Policy.** The Supreme Court of the United States in the case of Cowell v. Springs Co., supra, uses this language (page 57):

“The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap factories, distilleries, livery-stables, tanneries and machine shops have, in a multitude of instances, been excluded from particular localities, which, thus freed from unpleasant sights, noxious vapors or disturbing noises, have become desirable as places for residences of families.”

The purpose of the restriction here, as admitted in the defendants' answer, was to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes; it comes equally within the rule.

The discrimination against negroes has been recognized by the courts in other matters where their presence has been objected to for reasons similar to the reasons advanced here. For instance, the law providing for a segregation of negroes in separate passenger coaches from those occupied by whites, has been held lawful and reasonable. [Plessy v. Ferguson, 163 U. S. 537.] In the recent case of Keltner v. Harris, 196 S. W. 1, where an owner of real estate made a contract for the sale of the same to a white man, and after making his deed discovered that the deed was

made to a colored man for whom the white man was merely an agent, although he had told the agent that he would not sell the property to a negro because he didn't want a negro in that locality, this court held that the conveyance was properly avoided by the judgment of the circuit court on the ground of fraud. By a necessary inference the contract of sale could not have been transferred by the purchaser to a negro without the consent of the seller. The court said: "If it was distasteful to plaintiff to have the negro as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy," which is equivalent to saying that the contract could not be enforced in favor of the negro if made in ignorance of his interest in it. From these authorities it is apparent that the restriction was one which the vendor had a right to make and was not void on the ground that it was contrary to public policy.

V. It is further urged that it is void because it violates the rule against perpetuities. That rule is that an estate which is granted must necessarily vest within **Perpetuities.** a time limited by the lives of persons then in being, and twenty-one years and ten months thereafter, and if it does not *necessarily* vest within that time it is void for remoteness. [Shepperd v. Fisher, 206 Mo. 208.] In this case the stipulation runs for twenty-five years, within which time the estate might revert by forfeiture to the grantor. That event might occur after everyone in interest then living was dead and more than twenty-one years and ten months thereafter had elapsed.

The rule applies in all cases where there is a limitation over by which an estate would vest contingently and might vest after the prohibited time. But there is a distinction between a conditional estate and a conditional limitation whereby the estate is determined upon the happening of some event. In the latter case the estate passes to the person to whom the limitation over is granted upon the happening of the event, without

entry or other act. To such limitation over the rule against remoteness applies. But in this country it is generally held that a stipulation whereby the title is to revert to the grantor upon entry for breach of a condition subsequent, is not within the rule against perpetuities. [First Universalist Society v. Boland, 155 Mass. 171, l. c. 175; Hopkins v. Grimshaw, 165 U. S. 342, l. c. 356; Wakefield v. Van Tassell, 202 Ill. 41, l. c. 49; Gray on Rule Against Perpetuities, secs. 304-310.] In fact, there are many cases in the books, noted expressly in the sections from Gray just cited, where the courts have enforced forfeitures for breach of condition subsequent in which there was no time limit wherein the forfeiture might occur. In those cases the question as to whether it was contrary to the rule against perpetuities was not considered or discussed.

VI. It is true that where circumstances are changed, owing to the natural growth of a city or of the present use of a whole neighborhood, so that the purpose of a restriction in a conveyance no longer can be accomplished, and it would be oppressive and inequitable to give effect to such restriction, the courts will not enforce it, whether it be a restrictive covenant to restrain the violation of which injunction is sought, or whether it is a condition providing for a re-entry in case of breach. [Moore v. Curry, 176 Mich. 456; Kneip v. Schroeder, 255 Ill. 621; Devlin on Real Estate, sec. 991c; Thompson v. Langan, 172 Mo. App. l. c. 83.]

If the court upon sufficient inquiry had found, as claimed by defendants in this case, that the conditions had so changed since the conveyance was made, by negroes occupying the surrounding lots, that an enforcement of the restriction no longer could serve the original purpose, then it would have been improper to allow the forfeiture. However, the evidence was conflicting on that point. In fact, there was some evidence to the effect that the defendants themselves were the first ones to introduce colored residents into the block

where the lot was situated. The facts were found against the defendants upon that proposition upon sufficient evidence and that finding is conclusive upon this court.

VII. From what has been said it will be seen that the circuit court correctly determined plaintiffs' rights under the facts. Was it right in awarding possession to plaintiff?

It has been decided that Section 2535 did not repeal the ejectment statute and did not authorize a recovery of possession in an action brought under it. [Bedford v. Sykes, 168 Mo. 8; Randolph v. Ellis, 240 Mo. Possession. 216, l. c. 220.] Those cases, however, arose

before the amendment of 1909, whereby the Legislature added the last half of that section. We do not find that this amendment has enlarged the scope of the statute so as either to repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it. The entire article relating to ejectment remains still in force and can be resorted to for the recovery of possession and for the recovery of the value of improvements by an unsuccessful defendant.

Usually a plaintiff in a case under Section 2535 if out of possession, adds a count in ejectment. That was not done in this case, but the petition, in addition to stating a complete cause of action showing plaintiff's right to recover under Section 2535, alleges that the plaintiffs are the owners in fee simple of the property described and are entitled to possession of the same; that the defendants are in possession, and prays the court to adjudge the plaintiffs entitled to possession and to award a writ of possession in favor of the plaintiffs—a declaration in ejectment. Thus the petition states two causes of action in one count. No objection was made to this pleading by the defendant, by a motion to elect, or in any other way. The circuit court properly gave effect to the cause of action in ejectment pleaded by awarding possession to the plaintiffs.

VIII. It remains to consider whether the lower court erred in sustaining the motion for a new trial on the grounds stated, to wit, that the **Improvements.** court failed to allow defendants compensation for improvements on the property.

Both the plaintiffs and the defendants in discussing the matter of improvements assume that Section 2401, Revised Statutes 1909, applies, and that defendants' right to compensation for improvements upon the lot depends upon the application of that statute. Now that section, appearing in the article relating to ejectment, provides for compensation for improvements, put upon real estate by an unsuccessful defendant, after a judgment or decree of possession in any real action in favor of a person having a better title. Subsequent sections, immediately following, provide how recovery of such value may be had, and the party who would avail himself of it must bring his action and have the matter adjudicated before he is ousted from possession under the judgment against him. If he waits until afterwards he cannot recover. Section 2401 gives a right conditioned upon immediate action. It is not a recognition of a right which exists independent of the statute, but creates the right.

Manifestly, taking Section 2401 alone, compensation for improvements under it could not be assessed in favor of an unsuccessful defendant, *in the same case*, because by its very terms the right to meet compensation accrues only *after* judgment for possession, and can only be enforced in another action.

Respondents claim that the amendment of 1909 to Section 2535 permits recovery of such compensation in the same action. That amendment provides that, on a trial under that section, "*if the same be asked for in the pleadings of either party*, the court may hear and finally determine any and all rights," etc., and "may award full and complete relief," etc., "as the court might or could in any other or different action."

It is not necessary to determine whether the defendants would be entitled to compensation for their im-

provements under the circumstances. Nor is it necessary to determine whether the right created by Section 2401 would be available to a defendant by Section 2535, as amended, in the same case. It is clear that such compensation, under the latter section, cannot be allowed unless "asked for in the pleadings." That would be true, whether a defendant's right to such compensation arose by virtue of some equitable claim to the improvements, or by the operation of Section 2401. The answer here contains no mention of improvements and no averments beyond the claim of title and all matters affecting the title.

The judgment is reversed and the cause remanded with directions to set aside the order granting a new trial, reinstate the judgment originally rendered, and overrule the motion for a new trial. *Roy, C.*, concurs.

PER CURIAM—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

REUBEN S. ROSE et al. v. SPRINGFIELD &
BROOKLINE SPECIAL ROAD DISTRICT et. al.;
A. J. EISENMAYER, Appellant.

Division Two, July 30, 1918.

1. **MOTION FOR NEW TRIAL: Reasons for Ruling: Facts Established.** Where the motion for a new trial does not allege that the court improperly found any fact, and designates as the only error that the judgment for defendant was for the wrong party, it will be assumed on appeal from an order granting a new trial that the disputed facts were found in appellant's favor, and the question for determination is one of law, that is, whether on the facts found the judgment was against the law.
2. **ROAD DISTRICT BONDS: Validity: Power to Issue: Collateral Details.** The purchaser of road district bonds, for value before maturity, in the usual course of business, is not required to ascertain if all matters of detail in their issuance were regular.

Rose v. Road District.

If the commissioners were empowered to issue them and they appear upon their face to have been issued in conformity with the statute, he is not chargeable with notice of collateral facts as to whether the contract for the public improvement was properly entered into or faithfully performed.

3. ———: ———: **Collateral Matters: Plans of Construction, Etc.** Those parts of the statute (Sec. 10618, R. S. 1909) requiring the commissioners of a road district to employ an engineer to draw plans, advertise for bids and enter into a contract for the construction of the roads, relate to matters preliminary and collateral in their nature, over which a bona-fide purchaser of the district's bonds has no control, and hence they do not affect their validity.
4. ———: ———: **Derelections of Contractor.** The bona-fide purchaser of road district bonds cannot be held responsible for the failure of the contractor, over whom he had no control, with whom he had no contract and was not in privity, to complete the work within the time required by his contract, or to surface the road the agreed depth with crushed stone, or because he abandoned the contract before the work was completed.
5. ———: ———: **Certification of Amount.** The proviso of Section 10620, Revised Statutes 1909, as amended in 1911, requiring the commissioners of a road district, after its bonds have been issued and attested, to "make out and certify to the county clerk a statement of the amount of the bond issue, and a description of each tract of land within a certain distance of the proposed road, and acknowledge and file the same with the county clerk," can only be complied with after the bonds have been issued, and a failure to comply with it does not affect the validity of the bonds.

Appeal from Greene Circuit Court.—*Hon. Guy D. Kirby*, Judge.

REVERSED AND REMANDED (*with directions*).

Neville & Gorman, E. D. Merritt, Wm. H. Horine
and *Warren L. White* for appellant.

(1) The purchaser of bonds in good faith need not concern himself with either (a) irregularities in the manner in which the contract for the improvement is executed, or whether any contract is executed, or (b) whether the contract is performed, or how it is performed. All that is required of him is that he ascertain if the road district had authority to issue the bonds. Ho

is charged with notice of the law under which the bonds are issued and with notice of whether the conditions precedent to the issue of the bonds have been complied with. *Catron v. Lafayette County*, 106 Mo. 667; *Steines v. Franklin County*, 48 Mo. 175; *Carpenter v. Lathrop*, 51 Mo. 492; *Smith v. Clark County*, 54 Mo. 58; *Flagg v. Palmyra*, 33 Mo. 450; *Heard v. School District*, 45 Mo. App. 660; 28 Cyc. 1620, 1621, 1622. This rule applies to all the allegations of the petition except the 6th. (2) (a) The evidence shows that the certificate was made, but (b) Whether made or not, it is not a prerequisite to the issuance of the bonds, but is a step taken subsequent to their issuance, and forms the basis for the levy of the special tax. The purpose of this certificate is to furnish to the county clerk and collector the data on which to make out special tax bills. Instead of being a condition precedent to the issue of the bonds, it is a condition subsequent, performance of which the bondholder might enforce. Sec. 10620, R. S. 1909, amended, Laws 1911, p. 373. (3) The equities of the case are on the side of the defendants. (a) Plaintiffs delayed bringing their action till long after all the irregularities of which they complain had occurred. They allowed the work to be done, the bonds to be issued, registered and sold, and the contractor to be paid before starting their suit. They are estopped now by laches. (b) Plaintiffs and others similarly situated (in behalf of whom they sue) have enjoyed the use of the road built for nearly five years for which they have not paid a cent. Eisenmayer has paid \$8,000 for his bonds, on which he has not collected a cent of interest, accepting the bonds in good faith as a valid obligation of the road district. A judgment for the plaintiffs would nullify that obligation.

Barbour & McDavid for respondents.

(1) In considering this case we must keep constantly in mind the sections of the statutory law under which the alleged improvement was sought to be carried on. These sections, as construed by our courts, measure

Rose v. Road District.

the rights of the parties hereto and are controlling in this case. Secs. 10615-10620, R. S. 1909. (2) These statutes must be read into these so-called bonds, and it is the duty of the court and all parties dealing with them to read and consider in connection therewith the entire article of the statute bearing thereon, and authorizing their execution. Thus it will be readily seen that counsel for appellant have fallen into error in citing as authority cases dealing with bonds of a wholly different character from those involved in this action. *Embree v. Road District*, 257 Mo. 621; *Kirsch v. Braun*, 53 N. E. 1085. (3) The bonds involved in this action recite that they are the legal, valid and binding obligation of the district; that provision has been made for the collection of a direct annual tax on all taxable property within the district to pay the interest and principal thereof when due. The appellant proceeds on the theory that these are the bonds of the district and the authorities which he cites and quotes from all deal with ordinary bonds and have no application whatever to these so-called road district bonds. They are not the bonds of the district at all, and Mr. Eisenmayer was charged with notice of their invalidity when he purchased them a year after Hendrix had wholly abandoned his alleged contract. *Embree v. Road District*, 257 Mo. 593; *Kirsch v. Braun*, 53 N. E. 1082. (4) Before a valid contract for the construction of a road may be awarded and before valid bonds or tax bills may be issued, the following steps must be taken, as required by our statutes, viz: (a) The commissioners must fix the valuation of each tract of land in the district. (b) The commissioners shall thereupon request the county surveyor to draw up estimates of the costs of any road to be improved. The engineer, under the direction of the commission, shall make estimates of the cost of constructing the road and shall make a report, accompanied by maps and profiles, of the road proposed to be constructed, specifying therein what road or what portion of it should be macadamized, etc., and

separate estimates of the cost of each portion. These estimates of the engineer, together with the maps and profiles, shall be filed with the commissioners and be open to the inspection of all owners of land within the district. Sec. 10615, R. S. 1909. (c) Upon the filing of the engineer's report, maps and profiles, the commissioners shall call a general meeting of the land-owners of the district. At such meeting the commissioners shall submit the engineer's report, containing the estimates, together with the maps and profiles, to the land owners for examination and explanation and shall take a vote of the land-owners on the following propositions: First: Shall the road mentioned in said report be constructed according to any of the plans and out of any of the materials therein set out? Second: What materials shall be used? Third: Shall the cost be paid (1) at once, or (2) fix and determine the number of years, not to exceed twenty, through which the costs shall be distributed. Sec. 10616, R. S. 1909 (Laws 1911, p. 373). (d) If the owners of a majority of the acres of land in the district shall vote in favor of constructing any of the roads in said report mentioned and to charge the cost against the lands in said district, then the commissioners shall make out and sign and acknowledge a report of such action, and file same with the clerk of the county court, and from the filing of said report said public road district shall be a political sub-division of the State, etc. Sec. 10617, R. S. 1909. (e) The commissioners shall then employ an engineer to draw up plans and specifications for the construction of the road and of the materials according to the vote of the land-owners as in Section 10616 directed, and said specifications shall be filed with the commission, and thereupon the commissioners shall, in the name of the road district, enter into a written contract with the lowest and best bidder for the doing of said work according to said specifications. Said contract shall in no case provide for the payment of a sum of money in excess of the estimates voted upon at the land-owners' general meeting plus ten per cent thereof. Sec. 10618, R. S.

1909. (f) When the land-owners in the land-owners' meeting direct the cost of constructing a road shall be distributed through a period of years the board of commissioners shall issue the bonds of the road district in an amount not to exceed the estimates submitted to said meeting, plus ten per cent thereof, and enter into a contract for the construction of said road as directed in Sections 10618 and 10619. Before delivery of said bonds the county clerk shall register them in a suitable book for the purpose. The board of commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, etc. The county clerk shall thereupon apportion to each tract its share of such bond issue, principal and interest, etc., and shall enter the same in a book, etc., and shall append his certificate thereto as county clerk, and from said date such apportionment shall be a charge against the tracts of land indicated, etc. Sec. 10620, R. S. 1909; Laws 1911, p. 374. (5) The contract with Hendrix, the bonds issued and the tax bills or assessments in question are each and all unauthorized and void for the following reasons: (a) At the request of the commissioners, the county surveyor drew up estimates, maps and profile for constructing a rock road sixteen feet wide. The commissioners submitted these to the land-owners at their general meeting and the landowners voted to construct a rock road sixteen feet wide according to those estimates, map and profile made for a sixteen foot road and voted to pay the cost thereof in deferred annual payments. Thereupon, the commissioners were authorized to employ an engineer to draw up plans and specifications for the construction of a rock road sixteen feet wide according to the vote of the landowners (not for a road fourteen feet wide for which no estimate was submitted and for which the land-owners did not vote). After the vote of the landowners the commissioners were authorized to make a contract, on competitive bids, for the construction of a sixteen-foot rock road and for no other. Some months thereafter, and without any action whatever by the land-

owners, the commissioners employed the county surveyor to prepare plans and specifications for a fourteen foot road, and of their own volition, and without any authority, they awarded a contract to Hendrix for constructing a road only fourteen feet wide, for which no estimate and no map, profile or plan was ever submitted to or voted on by the landowners. This contract and all subsequent proceedings thereunder are therefore void, and no valid tax bills or bonds based thereon can be issued. The purchaser of these bonds is charged with notice of their invalidity. Sec. 10615, R. S. 1909; Sec. 10616, R. S. 1909; Laws 1911, 373; Sec. 10617, R. S. 1909; Sec. 10618, R. S. 1909; Embree v. Road District, 257 Mo. 593; Kirsch v. Braun, 53 N. E. 1062. (b) This road district became a political sub-division of the State, by reason of the fact that the landowners at their general meeting held on August 31, 1912, voted in favor of constructing a rock road sixteen feet wide in accordance with the engineer's estimates, plans, map and profile therefor, followed by the commissioners' report thereof to the county clerk. Sec. 10617, R. S. 1909. (c) Bonds of the road district can be issued only when authorized by vote of the landowners, and then only for the construction or improvement of a road according to the estimates, map and profile submitted to them at their meeting; and even then, the amount of such bond issue is limited to the amount of the estimates submitted to them for the specific improvement, plus ten per cent. In this case the only estimate, plan, etc., ever submitted to the landowners' meeting and voted on by them was an estimate of \$18,000 for the construction of a sixteen-foot road. The bonds were not issued for the construction of that road at all and cannot of course be based on that estimate. The bonds herein involved were issued by the commissioners for the construction of a fourteen-foot road without any estimate therefor having been submitted to the landowners, and without a vote thereon, and the bonds are therefore void. Sec. 10620, R. S. 1909; Laws 1911, p. 374. (d) These bonds were never registered by the county

Rose v. Road District.

clerk. The commissioners did not make out and certify to the county clerk a statement of the amount of this bond issue and the land values. The county clerk did not apportion to each tract of land in the district its share of such bond issue, principal and interest, and did not enter the same in a book to be denominated "Bond Tax Record of ——— Road District," or in any book at all, and never appended his certificate thereto as county clerk, so that the tax bills or apportions involved in this action have never as yet become a charge against any of the tracts of land in this district, since they never become a charge except from the date of such certificate of the county clerk. Sec. 10620, R. S. 1909; Laws 1911, p. 374. (6) A special or local assessment is imposed by law upon real property for a public improvement, the extent of the assessment being determined by the special benefits which inure to the assessed property by reason of the improvement made. They are not considered burdens, "but as an equivalent or compensation for the enhanced value which the property derives from the improvement." Upon no other ground can they be for one moment upheld. *Embree v. Road District*, 257 Mo. 610; *Ranney v. Cape Girardeau*, 255 Mo. 517; *Trust Co. v. Pagenstecher*, 221 Mo. 128; *Farrar v. St. Louis*, 80 Mo. 386; *Coates v. Ridenour*, 84 Mo. 258. Hence, entire work must be completed before a valid tax bill can be issued. *Independence v. Gates*, 110 Mo. 385; *Hund v. Racliffe*, 192 Mo. 330; *Wills v. Burbank*, 182 Mo. App. 78; *Heman v. Loevy*, 64 Mo. App. 437. (7) In this case the bids, specifications and contract provided that the work shall be completed within 365 days. Something like two miles of the fourteen-foot road was partially done and the work abandoned. And at the date of this trial, March 24, 1915, more than a year after the time limit in the contract had expired, the remaining six miles of the road had been untouched. The tax bills are void. *Heman v. Gillian*, 171 Mo. 267; *Neill v. Gates*, 152 Mo. 592; *Barber Co. v. Ridge*, 169 Mo. 387; *Paving Co. v. Brick Co.*, 170 Mo. App. 506. The contract having expired

and having been abandoned, it cannot now be extended. Neill v. Gates, 152 Mo. 596; Hund v. Racliffe, 192 Mo. 324; Construction Co. v. Coal Co., 205 Mo. 79. (8) Changing plans and specifications materially after the bids are received without a new advertisement renders tax bills void. In this case the specifications required the road to be wet and rolled until thoroughly compacted and the bidders bid thereon. Thereafter, the commissioners virtually eliminated this item of \$2000 or more from the specifications and awarded the contract to Hendrix and added \$10 per mile to his compensation. No re-advertisement for bids was made. Johnson offered to do the work on that basis for \$3000 less than the amount the commissioners agreed to pay Hendrix. Maryville v. Lippman, 151 Mo. App. 450; Poplar Bluff v. Bacon, 144 Mo. App. 476; Independence v. Knoepker, 134 Mo. App. 606; Gratz v. Kirkwood, 182 Mo. App. 597; Burress v. Spring, 143 Mo. App. 694. (9) Standing by and seeing a public improvement made with knowledge of all the facts, does not prevent a property owner from maintaining a suit to cancel tax bills after the improvement is completed, under a void contract Verdin v. St. Louis, 131 Mo. 98; Perkinson v. Hoolan, 182 Mo. 189; Collier Estate v. Paving Co., 180 Mo. 390; Wheeler v. Poplar Bluff, 149 Mo. 46; McCormick v. Moore, 134 Mo. App. 680; Cushing v. Bullock, 151 Mo. App. 281. No one can be estopped by an act that is illegal and void. Nichols v. Bank, 55 Mo. App. 81; Bank v. Woesten, 68 Mo. App. 137; Cox v. Mignery & Co., 126 Mo. App. 669. The lien of a void tax bill issued for an improvement cannot be enforced against the property on the ground that the property owner subsequently made use of the improvement. Neill v. Trust Co., 89 Mo. App. 644.

WALKER, P. J.—This is a suit in equity, instituted the circuit court of Greene County, to restrain the collection of tax bills, and to declare invalid and cancel certain road bonds for the payment of which the tax bills were issued. Upon a hearing, there was a judgment for

appellant. Respondents moved for a new trial. From the interlocutory order granting same an appeal has been perfected to this court.

Stripped of formal verbiage, the specific allegations of the petition are as follows:

1. That the plans for the road adopted at the landowners' meeting called for a road sixteen feet wide, while the specifications on which the bids were made and which were embraced in the contract called for a road fourteen feet wide.

2. That the specifications provided for rolling the road, while the contract made omitted the rolling.

3. That the work was not completed within the time required by the contract.

4. That the contract was made in the name of the commissioners of the road district instead of the name of the district.

5. That the bond given by the contractor for the faithful performance of the contract did not run to the road district but to the commissioners.

6. That the commissioners failed to certify to the county clerk the amount of the bond issue.

7. That the contract was not performed according to the specifications in that the crushed stone was spread on the road to a depth of only three inches, while the specifications called for an average depth of 6½ inches.

8. That the contractor abandoned the work before its completion.

The separate answer of the sole appellant, Eisenmayer, was first a general denial. This was followed by admissions as to the organization of the road district and the appointment, qualifications and acts of the commissioners. To these was added a specific denial that the commissioners had failed to execute, acknowledge and file with the county clerk a certificate showing the issue of the bonds, the amount of same, the time they were to run, the rate of interest, and the date of their maturity; and a further denial that the certificate made by the commissioners to the county clerk did not contain

a description of the land chargeable with the taxes levied for the payment of the bonds, together with the relative locations of the land and the road to be constructed. On the contrary, it is affirmatively alleged that said certificate was made and filed as required by law, and that the issue of the bonds and the other requirements of the statute in regard thereto were complied with. To this answer was interposed a general denial.

The admissions of the parties and the testimony of witnesses disclose that the respondents brought this action as owners of land subject to taxation in the Springfield & Brookline Road District, one of the defendants below, and being the district in which the road bonds in controversy were issued. Of the other defendants, W. B. Cloud was, during a part of the time of these proceedings, county clerk of Greene County, until he was succeeded by the defendant, J. L. Likins, who was thereafter and is now such clerk. J. E. Potter, another defendant, is the collector of the revenue of said county. All of the other defendants, except A. J. Eisenmayer, who alone appeals, were during some part of the transaction out of which this suit arises, or are now, commissioners of said road district. Eisenmayer, the appellant, is the owner of a part of the bonds sought to be declared invalid. This district was established by an order of the county court of Greene County, April 10, 1912, under Article 7, Chapter 102, Revised Statutes 1909, and the amendments thereto. Upon the appointment of the commissioners for the road district by the county court, they employed, in conformity with Section 10615, Revised Statutes 1909, the county surveyor of Greene County to prepare, and he did so prepare in July, 1912, plans, specifications, maps and profiles in which provision was made for the construction of a rock road sixteen feet in width. In these plans it was provided, among other things, that the rock used in the construction of the road was to be harrowed and rolled until the surface had been rendered smooth. Upon the filing of the report of the county surveyor, the commissioners called a general meeting of

Rose v. Road District.

the landowners of said district, under Section 10616, Revised Statutes 1909, as amended, Laws 1911, p. 373, and the plans, as submitted, were adopted. After compliance with other requirements of the statute, the commissioners requested bids for the construction of the road, in conformity with the plans, etc., adopted by the landowners, except that it was proposed to let the contract for a road fourteen feet in width, instead of sixteen feet. Upon an examination of the bids, it appeared that the one submitted by D. G. Hendrix was the lowest. He was, thereupon, awarded the contract. Before the same was signed, it was discovered that his bid did not conform to the plans, in that it omitted the requirement that the rock when placed on the road was to be rolled. Upon discovering this omission, the commissioners refused to award the contract to him, and the difference was adjusted by their agreeing to furnish him with a roller and to allow him \$10 per mile in addition to his bid for the rolling. This modification was made by the commissioners and the contractor alone, and the contract was thereupon, on the 25th day of January, 1913, signed, and the work commenced. This contract called for the construction of eight miles of road. About two miles of the same were constructed as required, when, in May, 1913, the contractor abandoned the work. About the time of this abandonment, acting under Section 10620, Revised Statutes 1909, as amended by Laws 1911, p. 374, the commissioners issued bonds of the district for the payment of the cost of improving the road, of the total par value of \$18,000. On May 14, 1914, the commissioners sold a portion of these bonds of the par value of \$8000 to the appellant, Eisenmayer, and out of the proceeds, paid the contractor \$4962.12 in satisfaction of his account for the work claimed to have been performed by him under his contract. The bonds not sold, of the par value of \$10,000, are in the hands of the commissioners. Under the contract, Hendrix was required to complete the same within 365 days after January 25, 1913. Upon his failure so to do, he was to be subjected to a penalty of five dollars per day for

each day's failure thereafter, which was to be deducted from the amount due him. So far as the formal compliance with the law is concerned regulating the issuance of bonds of this character, there is no contention. They indicate on their face that they are the bonds of the road district, to be paid by the annual levy and collection of a direct tax upon all the taxable property in the district, and that provision for such revenues had been made before their issue.

It was admitted that the taxes have been assessed against the respective properties of these plaintiffs on account of building this road, and the bonds purporting to have been issued on account thereof, in the amount set forth in the petition for the year 1913 and for the year 1914; and that taxes were extended in a similar manner for the year 1913, for a similar purpose, against the other lands similarly situated.

It was also admitted that the Collector of the Revenue of Greene County will proceed to enforce the taxes if not restrained by order of court in this proceeding.

I. The only matters before the court on the motion for new trial were the admission and rejection of evidence, and that the judgment was for the wrong party. The motion does not allege that the court improperly found any fact or designate any other error. The judgment of the court being for the defendants below, the disputed facts must have been found in their favor. The question on a motion for a new trial, excepting as to the admission and exclusion of evidence, was, therefore, one of law, i. e. whether on the facts as found, the judgment was against the law. In sustaining the motion for a new trial, the order for which is general in its terms, the court, therefore, must have concluded that on the facts as found, the judgment for defendants could not stand.

We are sustained in this conclusion as to the reasons for the trial court's ruling on the motion for a new

trial, by the petition. The analysis of same, above set forth, shows that its 1st, 2nd, 4th and 5th allegations relate to irregularities in the execution of the contract with Hendrix; that its 3rd, 7th and 8th relate to irregularities in the performance of the contract by him; and the 6th relates to the certificate of the amount of the bond issue which the commissioners are required to make to the county clerk as a basis for computing the taxes to be levied for the purpose of paying off the bonds.

In determining the validity of the bonds in controversy the purchaser of same for value before maturity, in the usual course of business, need not concern himself with matters of detail as to their issuance.

**Validity of
Bonds.**

What he is required to do is to ascertain, at his peril, if the commissioners were clothed with power to issue them. When issued, he has a right to trust to their decision as to the regularity of the proceedings. Familiarity with the statute authorizing the issue being a prerequisite, if the bonds show upon their face to have been issued in conformity therewith, the purchaser will not be chargeable with notice of collateral facts as to whether the contract has been properly entered into or fully and faithfully performed. We so held in *Catron v. Lafayette Co.*, 106 Mo. 659.

In *Steines v. Franklin County*, 48 Mo. 167, a suit in equity to cancel bonds issued by the county court for the improvement of roads, in which misconduct on the part of the county officers and the contractor was alleged as a ground for canceling the bonds, we said: "What has been said in argument as to the bad faith and dishonest conduct of the officers and contractors can have no weight against the defendants, who innocently invested their money, provided the authority to issue the bonds actually existed. . . . The folly of county officers, and the arrant knavery of contractors and speculators, are considerations which might have application in a proceeding to restrain the issue or negotiation of the bonds, but ought not to be allowed

to authorize their repudiation when they have come into the possession of bona-fide holders."

In *Carpenter v. Lathrop*, 51 Mo. 483, a suit on the interest coupons of bonds issued by the town of Lathrop in aid of a railroad, as a defense the town urged that the railroad company had not complied with its duties in completing the road in the time agreed, or in building a depot at a certain place, we held that these defenses were not available against the bona-fide holder of the bonds, employing this language: "It is not necessary to examine the question whether the railroad company [in whose aid the bonds were issued] complied with its duties under the subscription of stock, in completing the road in the time named, or in erecting a depot at the place named, or any of these collateral facts. These are matters that need not concern the holder of a bond or coupon purchased in good faith. If the power was conferred upon the trustees of the town to take the stock and execute the bonds, any irregularity in the exercise of the power conferred . . . could not be relied on to defeat the bonds in a collateral way." The bonds were held invalid because there was no proof that an election had been held, and that the voters thereat had authorized the issue of the bonds.

In *Heard v. School District*, 45 Mo. App. 660, it was held that the authority to issue municipal bonds is conferred by law and by the decision of the voters, and when an election has been held and the will of the voters ascertained, the bonds are valid in the hands of a bona-fide purchaser, notwithstanding irregularities in the proceedings.

In the present case, the appellant Eisenmayer is a bona-fide holder of \$8000 worth of the bonds. He paid full value for them, took them before maturity, and he was without knowledge of any irregularities in their issuance. Of what then, is he bound to take notice?

Much has been admitted in regard to the regularity of the issuance of the bonds. Disregarding for the moment these admissions, the statute will furnish the

Rose v. Road District.

answer as to the measure of the bondholders' duties. The review of same is therefore pertinent.

An absence of allegations from the petition of any irregularities in the organization of the road district renders a consideration of Sections 10611 to 10614, Revised Statutes 1909, relative thereto, unnecessary. Nor is any point raised as to a failure of the commissioners to comply with Section 10615 in regard to the valuation of the tracts of land to be effected by the proceeding. That the required landholders' meeting was held after proper notice, and that the matters there to be determined were submitted, voted upon, and the result reported to the county clerk, as required by Sections 10616 and 10617, are shown by the record. Section 10618 prescribing the duties of the commissioners in employing an engineer to draw plans, etc., advertise for bids, and enter into a contract for the construction of the road, are, from their nature, preliminary and collateral, and as a consequence, are matters over which the bondholder has no control; and, as affecting the validity of the bonds, they are of no concern to him, as we have held in the cases cited. Irregularities in the performance of the duties required by these sections are consequently not such as will affect the validity of the bonds in the hands of a holder, as in the case at bar. They are, therefore, such as are included in the 1st, 2nd, 4th and 5th allegations of the petition, as shown by the analysis we have made of same. Section 10619, providing for the payment of tax bills, and when costs are to be paid, has no application to bonds issued under the conditions here existing.

The 3rd, 7th and 8th allegations of the petition relate to the performance of the contract by Hendrix, the contractor. The latter was not made a party to the suit. The bondholder cannot be held responsible for derelictions of the contractor, over whom he has no control, with whom he has no contract and is not in privity. The district makes a contract with the bondholder that it will pay the bonds at maturity; and with the contractor it makes an entirely different contract.

If the contractor is derelict, the district has its remedy by suit on his bond, or by withholding payments; but the bondholder has no power to interfere, even though he knows the contractor is violating his agreement. These matters, therefore, are, under the authorities cited above, irrelevant to the question of the validity of the bonds.

Section 10620, as amended, Laws 1911, p. 374, provides that when the landowners direct, the cost of the contemplated improvement shall be distributed over a number of years; that the commissioners shall issue bonds as thereafter directed for the payment of the expense to be incurred; and that the bonds of the district shall be issued for the length of time that has been directed, for an amount not exceeding the estimated expense of the construction, plus ten per cent in excess of same; and that a contract shall be entered into as provided in Sections 10618 and 10619; that the bonds shall run in the name of the road district, shall bear not exceeding six per cent interest, and shall be payable as directed, with the proviso that they may be paid at any time after one year on call, and how they shall be signed and attested. The section further prescribes how the bonds shall be sold, and what shall be done with the money raised therefrom. This is followed by the provision that "the board of commissioners shall make out and certify to the county clerk a statement of the amount of the bond issue, and a description of each tract of land, within a certain distance of the proposed road, etc., and acknowledge and file same with the county clerk." It is urged that the portion of the section quoted has not been complied with, no question being raised as to any other part of same.

After a careful examination of the testimony, we have reached the conclusion that there is ample proof of a compliance by the commissioners with the requirements of Section 10620 quoted. If this did not affirmatively appear, the nature of the duty enjoined is such that it cannot constitute a condition precedent to the issuance of the bonds. The certificate is required to

Savings Bank v. Denker.

state the amount of the bonds that have been issued; involving, as this requirement does, the statement of a past transaction, it can only be made after the bonds have been issued. No power, therefore, as to the issuance of the bonds could arise from the making of the certificate, for the evident reason that at the time the same is required to be made, the bonds have already been issued. In our opinion, therefore, the contention made in the 6th allegation of the petition, as analyzed, as to the effect of the failure of the commissioners to make the certificate does not affect the validity of the bonds.

From all of which it follows that the trial court erred in granting the new trial. The order for same is, therefore, reversed, and the cause is remanded with directions that the original finding of the trial court be reinstated and that a judgment be entered in conformity with same. All concur.

ST. CHARLES SAVINGS BANK v. EDWIN B. DENKER et al., Appellants.

Division Two, July 30, 1918.

1. **DEPOSITION: Admission: By Agent of Party.** In order that the declarations of an agent may bind his principal as an admission the declarations must have been made during the continuance of the agency and in regard to the transaction then depending; if they were not contemporaneous with the transaction and illustrative of its character, but merely a subsequent narrative of how it occurred, they are not admissible in evidence against the principal. So that where defendants were sued on a cashier's bond for defalcations occurring prior to his discharge in 1904, statements made by the president of the bank in a deposition taken in 1906 are not admissible as admissions against the bank in its suit on the bond.
2. ———: **Incomplete: Deprived of Right of Cross-Examination: Death of Deponent.** Where the taking of the deposition by defendants was not completed, but before the witness's examination in chief was concluded an adjournment was had at the request of defendants and with the consent of the parties, and it does not appear that

Savings Bank v. Denker.

the deposition was not completed on account of deponent's sickness, or that defendants made any effort thereafter to continue the taking of the deposition, or that the illness of deponent was so serious that the deposition could not have been finished at some time during the three months that he continued to live, the deposition cannot as such be admitted in evidence over the objection of plaintiff that he was deprived of the right of cross-examination.

3. **EVIDENCE: Same Rules in Law and Equity.** The general rules of evidence in courts of law and in courts of equity are the same, and there seems to be no reason under the code of procedure for applying different rules to the admissibility of testimony.
4. ———: **Errors of Trial Court: Attack by Respondent.** Respondent on appeal may attack erroneous rulings of the trial court for the purpose of sustaining his judgment. He may point out errors committed against him in order to sustain a judgment in his favor. Where plaintiff objected to the admission in evidence of a deposition, and was overruled by the referee, who nevertheless made findings in his favor, with which he was satisfied and which were approved by the trial court and judgment was rendered in his favor, he has the right on defendant's appeal, in an effort to sustain his judgment, to object to the competency of the deposition, and ask the court to exclude it from consideration, because it was erroneously admitted in evidence by the referee.
5. ———: **Suit on Bond: Admission of Principal: Binding on Sureties: Res Gestae.** An admission of the principal in an employee's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety in the trial of a suit on the bond. And the words "while engaged in the discharge of his duties" mean that any statement made by the principal during the continuance of the term for which the sureties are bound, concerning any transaction during that term, is admissible against the sureties. So that where an investigation of the cashier's shortage was begun on the fifth of the month and the directors instructed him to make no further entries on the books, and other persons were put in charge of them, although he continued in and around the bank until his discharge on the ninth, a written statement explaining the discrepancies and his false entries made to a director and signed by him on the seventh, was competent evidence against the sureties on a bond which covered the period and made them liable for any loss occasioned by his act.
6. **CASHIER'S BOND: Directors' Knowledge of Dishonesty: Concealment: Neglect: Liability of Sureties.** If the officers and directors of the bank had knowledge of the cashier's dishonesty and accepted the bond with such knowledge, without disclosing to his sureties what they knew of his character, the sureties are not liable. But

Savings Bank v. Denker.

if they were only careless and negligent in failing to ascertain his character, the sureties are liable.

7. ———: **Evidence Not Preserved: Reference Case.** If the evidence in regard to an item allowed by the referee in a compulsory reference case of which appellants complain is not preserved in the abstract, the appellate court will not review the matter.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

AFFIRMED.

B. H. Dyer and Jones, Hocker, Sullivan & Angert for appellants.

(1) The deposition of Bruere was properly admissible in evidence. (a) As a deposition, notwithstanding the lack of cross-examination and signature. *Scott v. McCann*, 76 Md. 47; *Fuller v. Price*, 4 Gray (Mass.) 343. (b) As the properly proven testimony of the witness concerning the litigation. 16 Cyc. 1099. (c) As the declarations of the bank by its president against interest. *Malack v. Railway Co.*, 57 Mo. 21; *Roberts v. Railway Co.*, 153 Mo. App. 695. (d) No exceptions having been filed by respondent to the ruling of the referee in admitting the same, the question cannot be re-examined. *R. S.* 1909, sec. 2012; *Berry v. Rood*, 209 Mo. 673; *Anderson v. Caldwell*, 242 Mo. 206; *Buxton v. Debrecht*, 95 Mo. App. 604. (2) The obligation of the appellant sureties on the bond in suit was procured by respondent by fraudulent concealment of prior misconduct of the cashier and is thereby avoided. *Third National Bank v. Owen*, 101 Mo. 580; *Harrison v. Insurance Co.*, 8 Mo. App. 41. (3) The so-called Mispagel "confession" was inadmissible against the appellant sureties, and constituted, confessedly, the only evidence upon which to base a judgment against the appellant sureties on the Baird drafts, or any of them. *State to use v. Bird*, 22 Mo. 474; *Father Matthew Society v. Fitzwilliam*, 12 Mo. App. 449,

275 Mo.—39

84 Mo. 406; Stetson v. Bank of New Orleans, 2 Ohio St. 167; White v. German National Bank, 9 Heisk (56 Tenn.) 475; Knott v. Peterson, 125 Iowa, 404; Weider v. Surety Co., 86 N. Y. Supp. 105; Lee v. Brown, 21 Kan. 458; Hatch v. Elkins, 65 N. Y. 499; Underhill on Evidence, sec. 73; Cook Co. Liquor Co. v. Brown, 122 Pac. (Ok.) 168; Blair v. Ins. Co., 10 Mo. 567.

Charles W. Bates, Theodore C. Bruere, David Barron and C. W. Wilson for respondent.

(1) The statement or so-called deposition of Theodore Bruere, Sr., was improperly admitted, and should not be considered by the court. R. S. 1909, sec. 1996; State ex rel. v. Ice Co., 246 Mo. 202; Reed v. Young, 248 Mo. 612; Dannerfelter v. Weigel, 27 Mo. 45; Attwell v. Lynch, 39 Mo. 519; Chamberlayne on Evidence, sec. 2713; Pringle v. Pringle, 59 Pa. St. 281; State v. Grant, 79 Mo. 137; People v. Cole, 43 N. Y. 508; Sperry v. Moore's Estate, 42 Mich. 353; Bangs Milling Co. v. Burns, 152 Mo. 380; Byrne v. Feed Co., 143 Mo. App. 85; Vohs v. Shorthill, 124 Iowa, 471; Goetz v. Bank of Kansas City, 119 U. S. 557; Rogers v. McCune, 19 Mo. 569; Calson v. Ebert, 52 Mo. 270; King v. Insurance Co., 101 Mo. App. 172; McDermott v. Railway, 73 Mo. 518-519; Scovell v. Clasner, 79 Mo. 455-456; Redmond v. Railroad, 185 Mo. 12. (2) There was no fraudulent concealment of any facts from the sureties, and they are not discharged from liability on the bond in suit. Hartford Ins. Co. v. Casey, 191 S. W. 1072; State to Use v. Atherton, 40 Mo. 218; Third National Bank v. Owen, 101 Mo. 558; Harrison v. Ins. Co., 8 Mo. App. 37; Farmers Bank v. Ogden, 192 Mo. App. 243; Bostwick v. Van Voorhis, 91 N. Y. 353; Atlas Bank v. Brownell, 9 R. I., 173; Hebert v. Lee, 12 L. R. A. (N. S.) 247 (Tenn.); Palatine Ins. Co. v. Crittenden, 18 Mont. 413; Wright v. Brewing Co., 103 Md. 377; Ida Co. Sav. Bk. v. Seidensteiner, 92 N. W. 862; Magee v. Manhattan Life Ins. Co., 92 U. S. 99; Chew v. Ellingwood, 86 Mo. 271; Lake v. Thomas, 84 Md. 608; Home

Ins. Co. v. Holway, 55 Iowa, 571; Roper v. Trustees, 91 Ill. 518; Watertown Sav. Bank v. Mattoon, 78 Conn. 338; Railroad Co. v. Schafer, 59 Pa. St. 357; Aetna Ins. Co. v. Mabbett, 18 Wis. 667; Screwman's Ben. Assn. v. Smith, 70 Tex. 168; Charlotte Railroad v. Gow, 59 Ga. 685. (3) The true rule to apply in this case is the rule which applies in cases where the Government is obligee in the bond. Watertown Sav. Bk. v. Mattoon, 78 Conn. 338; Chew v. Ellingwood, 86 Mo. 260; State to use v. Atherton, 40 Mo. 216; Railroad v. Schafer, 59 Pa. St. 357; Lake v. Thomas, 89 Md. 608; R. S. 1909, sec. 1112. (4) The Mispagel statement was properly received in evidence. Savings Assn. v. Edwards, 47 Mo. 449; Bricker v. Stone, 47 Mo. App. 535; Benevolent Society v. Fitzwilliams, 12 Mo. App. 448; Benevolent Society v. Fitzwilliams, 84 Mo. 406; Singer Mfg. Co. v. Reynolds, 168 Mass. 591.

WHITE, C.—The plaintiff bank brought this suit against the defendants as sureties on the bond of A. F. Mispagel, plaintiff's cashier. The petition, after alleging the employment of Mispagel as cashier and setting out the undertaking, alleged that Mispagel had misappropriated and neglected to account for large sums of money, amounting to \$36,275.05; and that at divers times during the period covered by the bond said Mispagel had made false entries in the books of the plaintiff bank for the purpose of concealing the misappropriations—entries which indicated money received by plaintiff bank which was never received, and entries showing money paid out which never was paid out—and also that he had failed to enter upon the books of the bank large sums of money that were received and paid out by the bank. A detailed, itemized statement of the several sums lost to the bank by reason of the misconduct of Mispagel is set forth in the petition.

The bond on which the suit was brought was in the sum of fifty thousand dollars, and conditioned that Mispagel should well and faithfully perform all the duties of such cashier, either under his present appoint-

ment or under any further appointment, and that the said securities would hold the bank harmless for any loss occasioned by any act of said cashier, either under his present appointment or any further appointment, until all his accounts with said bank had been fully settled and satisfied, and all money, funds and valuables belonging to said bank delivered by him, on proper demand, to the said board of directors of said bank, or the person authorized to receive the same.

Mispagel was first employed by the bank on February 17, 1890, and reappointed annually in January of each year until his final appointment January 2, 1904. During that period he gave three bonds, one executed when he was first appointed, his second one in January, 1898, and the third one, on which this suit was brought, January 2, 1904. He was discharged on the ninth of November, 1904, and the suit is for alleged defalcations which occurred during the period of his last appointment and the life of the last-mentioned bond. It appears from the record that suits had been brought on the two previous bonds for alleged shortages in Mispagel's accounts which occurred during the periods prior to the giving of the last-mentioned bond, involving sums aggregating \$90,000. The present suit is on account of losses represented by twelve items amounting to \$36,275.05, due to alleged misconduct of Mispagel during the life of the last bond.

The case was referred on motion and a compulsory reference was had.

The answer sets up a number of defenses, all of which are treated and disposed of by the referee, but those pressed upon our attention here are as follows:

A general denial, under which it is claimed that the proof does not sufficiently show the losses sued for occurred during the life of the bond sued on;

Allegations that Mispagel had acted as cashier of the bank for many years prior to the execution of the bond sued on, and had been guilty of misconduct amounting to violations of the law and causing losses to the bank, which misconduct was known to plaintiff and

Savings Bank v. Denker.

unknown to defendants; that plaintiff took the bond without communicating to defendants such knowledge, and that this concealment of the plaintiff's knowledge of the character and conduct of Mispagel was a fraud upon these defendants and releases them from their liability upon the bond;

Attacks upon the separate items of the statement in the plaintiff's petition, and averment that the false entries in connection with each item showed that they were made in an effort to cover up defalcations which occurred prior to the execution of the bond sued on.

The referee took the evidence and filed his report, in which he found that during the period of each of the preceding bonds given by Mispagel the funds of the bank were taken by him, or by others with his consent; that he made fictitious entries in the books to conceal and cover up such shortages; that he still concealed and carried forward the shortages which had originated during all the period of his three bonds, by means of false entries in the books of the bank made during the period of this last bond. But after a careful examination of all the evidence adduced, the referee satisfied himself that he had eliminated from consideration all such items. He found against the plaintiff as to seven of the twelve items sued on, and found in favor of the plaintiff upon five, as follows:

Interest item	\$ 502.12
Draft No. 106420	3,000.00
Draft No. 106503	800.00
Raised note	135.47
Third National Bank transaction	18,596.10
Total	\$23,035.69

The defendants filed exceptions to this report, alleging various errors on the part of the referee in his findings of fact, admission and rejection of evidence, and conclusions of law, which exceptions were by the circuit court overruled, and judgment was entered by said court in accordance with the report of said referee for \$50,000, the amount of the bond, and the damages

assessed at \$23,035.69. From this judgment defendant appealed.

I. It is necessary to consider first the admissibility of certain items of evidence.

The so-called deposition of Theodore Bruere, Sr., is in the record and admitted in evidence over the objection of the respondent, which now claims it should not be considered by this court as evidence in the case. Several perplexing questions arise in determining that issue:

**Admissions
of Agent.**

Theodore C. Bruere, Sr., was president of the plaintiff bank in 1906, and had been for several years. On the tenth of March, 1906, pursuant to due notice, the defendant proceeded to take his deposition. An admission appears in the record to the effect that both parties were represented and it was agreed between them that the deposition might be taken in shorthand and afterwards transcribed and submitted to the witnesses for signature, "subject to the statutory allowance as to the admissibility thereof; and it is further admitted that the witness, Mr. Bruere, was sworn and in answer to the questions hereinafter set forth gave the answers hereinafter set forth; that the taking of the deposition was not completed on account of the sickness of Theodore Bruere, Sr., on March 10, 1906."

It was further stipulated that the taking of the deposition was, "at the request of the defendant, and with the consent of the parties, adjourned, and the taking of this deposition was not thereafter resumed on account of the death of Mr. Theodore Bruere, Sr."

It was also stipulated that the stenographer who took the testimony in shorthand would testify if present "that the questions and answers contained in said deposition hereinafter offered, marked 'Exhibit ——' correctly represents the questions that were propounded and the answers that were made by Mr. Bruere on the day of taking said deposition."

The certificate of the notary attached to the deposition bears date of the 22nd day of May, 1909, more than

three years after the testimony was taken. This certificate recites the stipulation mentioned, the notice, that Bruere was sworn by the notary to testify, and that before his examination the notary "was excused from further attendance at the taking of the deposition by consent of both parties, and that the forgoing was presented to me by the stenographer who reduced the testimony of said witness to writing, as a correct statement of the questions propounded to and the answers given by him; that before the foregoing testimony was signed by said witness the said witness became sick, and the notary was unable to obtain his signature, and the said witness subsequently died without having signed said deposition."

When this document was offered in evidence the defendant objected to its admission, and the referee rejected it as a deposition, but received it in evidence as containing admissions made by an officer of the bank against the interests of the bank.

The appellants now claim that the deposition properly was received in evidence on that theory, but content themselves with the statement made by the referee of his reasons for admitting it on that ground, and cite two cases in support of that position: *Roberts v. Railroad*, 153 Mo. App. l. c. 644; *Malecek v. Tower Grove Railroad Co.*, 57 Mo. l. c. 21.

The rule relating to the admission of the declarations of an agent is that in order to bind the principal the declaration must have been made during the continuance of the agency in regard to the transaction then depending. If the statements of the agent were not contemporaneous with the transaction and illustrative of its character, but merely a subsequent narrative of how it occurred, it is inadmissible. [*Redmon v. Railroad*, 185 Mo. l. c. 12; *McDermott v. Railroad*, 73 Mo. l. c. 518-19; *Scovill v. Glasner*, 79 Mo. l. c. 455-6; *Bangs Mfg. Co. v. Burns*, 152 Mo. l. c. 380-1.]

We do not understand that the cases cited by the referee in support of his position indicate a contrary rule. Each seems to turn upon the construction of the

facts in the particular case. In this case, the testimony of Bruere set out in the document offered as his deposition related to transactions which occurred years before. At the time his statement was taken he was not acting for his bank, although president and a director of it, nor transacting the particular business referred to in the statement, nor any business of the bank. On the contrary, his statement was taken under the constraint of process and at the instance of the defendants. It was therefore incompetent as an admission of the plaintiff bank and was erroneously admitted in evidence on that ground.

II. Appellants, however, contend that it was admissible as a deposition, that this court should consider it as a part of the record as a deposition, and that the theory upon which it was admitted is immaterial.

Deposition. Several objections are urged by respondent to the competency of this deposition, the principal one of which—and the only one necessary to consider—is that the deposition was incomplete and the plaintiff deprived of its right to cross-examine the witness.

The general rule is that where a party is deprived of the benefit of cross-examining a witness, by the act or neglect of the opposite party, or by the misconduct of the witness, the testimony of such witness cannot be read in evidence. [Sturm v. Atl. Mut. Ins. Co., 63 N. Y. l. c. 87; Kissam v. Forrest, 25 Wend. 651; Forrest v. Kissam, 7 Hill, 463; Gallagher v. Gallagher, 87 N. Y. Supp. 343; Matthews v. Matthews, 6 N. Y. Supp. 589; Dannefelser v. Weigel, 27 Mo. 45, l. c. 47; Celluloid Mfg. Co. v. Arlington Mfg. Co., 47 Fed. 4.] It is suggested in some of the books that rulings in some cases in chancery would conflict with this general principle of evidence, but this suggestion is qualified by the further statement that such cases depend upon their own peculiar circumstances.

The general rules of evidence in courts of law and courts of equity are the same, and there seems to be no

reason under our code of procedure for applying different rules to the admissibility of testimony, considering this an equity case on account of it being a compulsory reference.

The appellants cite only two cases in support of their position. In the first of these, a chancery case, *Scott v. McCann*, Admr., 76 Md. 47, the opinion contains this statement (l. c. 51): "It seems to be admissible in equity cases to receive the testimony of a witness whose cross-examination has been prevented, or cut off by death, where such cross-examination has not in any way been prevented by the fault of the party producing the witness, or of the witness himself."

The court then points out that a strong reason for receiving testimony in that particular case was because the plaintiff had already testified, and the defendant, after testifying in chief, died before his cross-examination. If his testimony in chief were not admitted the plaintiff would have an unfair advantage, unless the testimony of the plaintiff were stricken out in accordance with the purpose of the statute, which seeks to put parties upon an equality by excluding the testimony of the survivor, where one is dead. The court solved the matter by permitting the incomplete testimony or defendant to be introduced. The opinion distinctly says that the completion of the defendant's testimony was prevented by the act of God, so the defendant himself was in no way to blame for the failure to have his cross-examination taken.

The other case cited by appellant, *Fuller v. Rice*, 4 Gray, 343, is where it seems the testimony was substantially complete. The cross-examination was begun, but not finished, and the court held the deposition admissible.

In the case of *Kissam v. Forrest*, supra, it was held an incomplete deposition was inadmissible, but the case was appealed and reversed, and under the title of *Forrest v. Kissam* reported in 7 Hill, 463. In reversing it, after holding that the incomplete deposition was admissible, the court said: "I admit the rule should be

otherwise where the right to cross-examine the witness has been lost by the fault or neglect of the party calling him."

In the case of *Sturm v. Insurance Co.*, supra, the New York Court of Appeals announced the rule thus: "It may be taken as the rule, that where a party is deprived of the benefit of the cross-examination of a witness, by the act of the opposite party, or by the refusal to testify or other misconduct of the witness, or by any means, other than the act of God, the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read."

In the case of *Gallagher v. Gallagher*, supra, the witness on cross-examination refused to answer, and the court declined to compel him to answer. On appeal it was held the testimony of the witness should be stricken out. The court said (87 N. Y. Supp. l. c. 344):

"The defendant insists that he should not suffer because the court refused to compel his witness to answer, for he was willing that he should, and that the court should compel him to. But a party calling a witness is, in a sense, responsible for his conduct. If he has been examined in chief, and fails to return on an adjourned day for cross-examination, even though the party has endeavored to obtain his attendance, still he must suffer by the loss of his testimony."

In the case of *Matthews v. Matthews*, 6 N. Y. Supp. 589, the cross-examination of a witness was suspended on agreement between the parties that he should be present and recalled for further cross-examination. The witness failed to reappear when called, and it was held that his testimony should be stricken out.

The case of *Dannefelser v. Weigel*, 27 Mo. 45, is where the attorney for the plaintiff attended on the day and hour at the place appointed by defendant in the notice served for the taking of depositions. This attorney finding that he was obliged to leave for a little while on an errand for his sick wife requested the notary and the opposing counsel to proceed with the taking

Savings Bank v. Denker.

of the deposition, but to retain the witness for an hour that he might cross-examine her on his return. This the opposing counsel and the notary agreed to do. He went away, returned within an hour, and found that the witness had given her deposition and had gone. The plaintiff's attorney promised that he would have the witness at the office at a later hour. When she did not appear the promise was renewed for two successive days, but the witness still failed to appear and never was cross-examined. The court states that no blame was attached to plaintiff's counsel for the failure of the witness to appear, and that his promise to have her present was made in good faith, but his client was responsible for the movements of the witness, and, on account of his failure to produce her, a motion to suppress the deposition should have been sustained. We are unable to find any other Missouri case which discusses this precise point.

In the general rule, stated in the New York case cited above, where the act of God prevents the cross-examination of a witness, the testimony in chief is held to be admissible. If a witness is suddenly stricken with a fatal illness before he can be cross-examined, such that it is impossible for him to testify, it may be construed as an act of God which prevents the completion of the testimony.

Mr. Bruere did not die until in June, 1906, about three months after the deposition was begun. The stipulation states that his deposition was not completed on account of his sickness, but it nowhere appears that the defendants made any effort to continue the taking of the deposition, or that the illness of the witness was so serious that it could not have been finished at some time during that three months. It will be noticed that, according to the stipulation, the immediate adjournment of the taking of the deposition was not on account of the sickness of the witness, but at the *request of the defendant* and with the consent of the parties. It was not "completed;" the defendants had not finished their examination in chief. The stipulation does not say

whether the adjournment was to a definite day, or until a time to be agreed upon, or until the convenience of defendants' counsel permitted. The plaintiff was not required to do other than wait until the defendants were ready to proceed with the taking of the deposition and finish their examination in chief, before seeking to cross-examine the witness. It certainly was no fault of plaintiff or plaintiff's counsel that the deposition was not complete. It was the duty of the defendants to have the witness present, if possible, or to make an effort to continue the taking of the deposition, and no such effort is shown. Both parties may have regarded the matter as dropped without an effort to have the deposition completed, and this view is enlivened by the fact that the notary did not certify it until more than three years after it was taken. Under these circumstances, according to the rule announced, the deposition was not admissible in evidence as a deposition, and the referee and trial court erred in receiving it in evidence on any theory.

III. Appellants, however, contend that since it was admitted in evidence, it is in the record, and the respondent cannot now be heard to take advantage of its inadmissibility, because it filed no exception in the circuit court to the action of the referee in receiving it. When it was offered in evidence the plaintiff objected, and it was admitted by the referee over plaintiff's objection. The plaintiff was not required to file an exception to the referee's final report, because that report found the facts and rendered judgment in its favor. The general result was all it desired. There would have been no propriety in its requesting the circuit court to reconstruct the theory of the referee in order to render the judgment in its favor. It is true an *appellant* cannot take advantage of an error of a referee, unless he files an exception to his report, and also presents a motion for new trial pointing out errors to the circuit court which approves the report, and

**Right of
Respondent
to Object to
Incompetent
Evidence.**

assigns error in this court. But a *respondent*, not appealing, is not required to take any one of such superfluous steps, because he cannot be heard to question the propriety of a judgment from which he has not appealed.

Appellants do not make the point that plaintiff waived the right to question the competency of the deposition by failing to move its suppression before the trial began, but only urge that plaintiff cannot complain now because it did not except to the referee's report. On the other hand, inasmuch as the document was not received in evidence as a deposition, but only as an admission against the plaintiff, it might be said that the notary's certification and other formalities requisite for a deposition are not before the court at all. In fact, appellants assign error to the action of the trial court in rejecting it as a deposition. However, considering only the effect of the so-called deposition as it appears in the record, the question presented is this: has the respondent a right in this court to object to its competency in its effort to sustain the judgment of the trial court?

The cases which announce the well established rule, that a party not appealing will not be heard in this court to urge a review of errors committed against such party in the trial court, are always where the respondent seeks some affirmative relief in the appellate court. A respondent cannot have the advantage of errors committed by the trial court for the purpose of modifying in any manner the judgment in his favor. But it is generally held that the respondent on appeal may attack the rulings of the trial court which are erroneous, for the purpose of sustaining his judgment. [Mendota Club v. Anderson, 101 Wis. 479; Miller v. Brooks, 120 Ga. 232; Maxwell v. Hartmann, 50 Wis. 1. c. 664; Hackett v. W. U. Tel. Co., 80 Wis. 1. c. 190; Landram v. Jordan, 203 U. S. 1. c. 62; Philadelphia Casualty Co. v. Fecheimer, 220 Fed. 401, 1. c. 418; Huntington v. Love, 106 Pac. 185; Randle v. Pacific R. R. Co., 65 Mo. 325, 1. c. 334; Higgins v. Higgins, 243 Mo. 1. c. 171; 4 Corpus Juris, 696; Davis v. Glenn, 3 La. Ann. 444, 1. c. 446;

First Nat. Bank v. Wright, 84 Iowa, 728; Fleming v. Nor. Tissue Paper Mill, 114 N. W. 841.]

In *Davis v. Glenn*, 3 La. Ann., l.c. 446, the court said: "Although the appellee, by the failure to file his answer seasonably lost the right to attack the judgment for the purpose of changing it in his favor, he has a right to avail himself of the error made to his detriment by the court below as a protection against a charge asked by the appellant."

In the case of *Hackett v. W. U. Tel. Co.*, 80 Wis. l. c. 190, the court said: "The defendant's exception in the record is available in support of the judgment in its favor."

The Federal cases, in commenting upon this proposition and considering the limited right of the appellee to have adverse and erroneous rulings reviewed, put it in this way: appellee cannot go beyond supporting the judgment—cannot attack it.

Such are a few of the cases in other jurisdictions. The question has not often been discussed by the courts, but the rule as stated seems to be general so far as the matter has come before the courts.

The question was approached in this court in the case of *Randle et al. v. Pacific Railroad*, 65 Mo. 325, l. c. 334, where the plaintiff appealed from a judgment in his favor for nominal damages, and on appeal the respondent urged that plaintiff was not entitled to even nominal damages, and the court held the point well taken and said: "The verdict of the jury is for many purposes undoubtedly conclusive. The defendant cannot avoid it, and indeed does not seek to avoid it. But on an appeal by the plaintiff to set the same aside, it does not preclude this court from an examination of the whole case presented here, in order to ascertain whether the plaintiffs have been injured by that verdict. Nor does it preclude the defendant from asserting against the efforts of the plaintiffs to set the same aside, that they are not wronged thereby, but on the contrary have obtained more than in strictness they were entitled to,

and that on the pleadings and evidence they were really entitled to nothing."

This case would put this State in line with the rulings in other states, but for the case of Westminster College v. Piersol, 161 Mo. 270. In that case this court held squarely that the judgment was in favor of the defendant, and as he had not appealed therefrom he is in no position to insist upon an erroneous ruling from which he does not appeal, though its effect was to uphold the judgment (l. c. 285). But in that case no authorities are cited and the principle is not discussed. An analagous ruling, consistent with the Randle case, supra, is found in Higgins v. Higgins, 243 Mo. 164, where this court held that respondent might in this court point out errors of the trial court, in order to sustain the judgment of the trial court in granting a new trial, using this language: "After some contrariety of opinion, the rule is now established in this State that on an appeal from such an order it is the duty of appellant to show that there was error in making it for *any* of the reasons assigned therefor. This, however, does not necessitate a reversal of the action of the trial court, *for it is within the rights of respondent to call attention to any other errors than those referred to by the trial court, contained in the motion for new trial, as a sufficient ground to sustain the ruling appealed from.*"

The principle considered is the same that applies to any other appeal. The appellant must show that the order was error. The respondent may show it was correct by pointing out errors committed against him; that is, he may point out errors committed by the trial court against him, in order to sustain the judgment in his favor.

On principle, it would seem a proper duty of this court, in determining the rights of parties whose cause is presented here for consideration, to consider the matters shown by the judgment of the trial court where it was correct, notwithstanding errors committed by that court. The plaintiff in this case did its full duty

in objecting to the incompetent evidence. It could not appeal, because it had nothing to appeal from. It would have been a futile and superfluous task to present exceptions to the referee's report, file motion for new trial, and ask the trial court to reconstruct its theory of the case, because it did not seek a modification of the judgment. It simply asserts that the judgment of the trial court was right; that it was right upon the theory which the plaintiff presented to it. The plaintiff should not suffer in this court for the error committed against it there.

We hold, therefore, that the so-called deposition of Bruere was improperly admitted in evidence on any theory, and this court cannot consider it as evidence in the case.

IV. A signed statement made by A. F. Mispagel was admitted in evidence over the objection of defendants, and error is assigned to the action of the trial court in sustaining the ruling of the referee.

Admission of Cashier: Competency. The statement was obtained in this manner: Theodore C. Bruere, Jr., testified that he was one of the directors of the plaintiff bank in November, 1904. On the fifth of November an investigation of Mispagel's shortages was started, the directors instructed him to make no further entries on the books, and other persons, it seems, were put in charge of the cash and the books, although Mispagel was in and around the bank until his discharge November ninth. On November 7, 1904, while the investigation was in progress, Mr. Bruere, representing the bank, asked Mispagel for a statement explaining the discrepancies and false entries as shown by the books. Mispagel explained orally, and Bruere reduced his statement to writing; Mispagel examined it, corrected it in some particulars and signed it. Two days later, on the ninth of November, Mispagel was formally discharged.

Defendants excepted to the referee's ruling on two grounds: First, that Mispagel had ceased to perform the duties of cashier *in fact* when the statement was

made; and, second, that the statement could not be a part of the *res gestae* of his cashiership, because made to the attorney, instead of to those who managed the bank. A third objection is presented in this court to the competency of the evidence, but it was not mentioned in the exceptions to the referee's report and is unimportant. The question to be determined is whether we may apply to this case, under facts as stated, the general rule laid down in the books as follows: The admission of a servant, principal in an employee's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety upon his bond.

There is a sharp conflict in the authorities regarding the meaning to be attached to the expression, "while engaged in the discharge of his duties." In many jurisdictions it is held that the admission, in order to be competent evidence, must be made at the very time of the particular transaction under consideration, and thus form a part of the *res gestae*. [Stetson v. City Bank of New Orleans, 2 Ohio St. 167; White v. Germ. Nat. Bank, 9 Heiskell (Tenn.), 475; Knott v. Peterson, 125 Iowa, 404; Wieder v. Union Surety & Guar. Co., 86 N. Y. S. 105; Lee v. Brown, 21 Kan. 458.] These and other cases are cited by appellants in support of their objection. They hold that, in such case, in order to make declarations of the principal admissible against his sureties, they must not be made by the defaulting officer "after the default," or refer to "past occurrences." The declarations of the principal accompanying his acts while engaged in the particular matter under consideration are admissible. The admission afterwards of what he has done before is not admissible. It is his acts, and not his admissions or declarations, by which his sureties are bound. Declarations of the principal "made subsequent to the act to which they relate" are not admissible. Such are some of the expressions used by the authorities adopting that view in explanation of the principle announced.

On the other hand, the authorities are still more numerous which hold that the admissions and statements of the principal relating to his official duties, made while he is engaged in the discharge of such duties, *within the period covered by the undertaking of his sureties*, are admissible against them in an action on a bond. [Guarantee Co. of No. Am. v. Phenix Ins. Co., 124 Fed. 170, l. c. 174; Gilmer v. Baker, 24 W. Va. 72, l. c. 86; Treasurers of State v. Bates, 2 Bailey (S. C.), 362, l. c. 380-1; Bailey v. McAlpine, 122 Ga. 616-631; Wilson v. Greene, 60 Am. Dec. (Vt.) 279; Yates v. Thomas, 71 N. Y. S. 1113, l. c. 1117; McShane v. Howard Bank, 73 Md. 135, 10 L. R. A. 522, l. c. 557; Great Western Life Assurance Co. v. Shumway, 25 N. D. 268, l. c. 273.]

In the Phenix Insurance case, *supra*, on the last day of his employment, the cashier, on whose bond suit was brought, admitted he had been guilty of embezzlement in respect to four checks which were a part of the basis of the action. The statement was held admissible.

In the Gilmer case, *supra*, it was held that a statement made by an administrator before his official duties ceased, concerning his past transactions, were admissible against his surety.

In the Bailey case, 122 Ga., l. c. 631, it was said: "Admissions of a principal, made during the transaction of the business for which the surety is bound, become a part of the *res gestae*."

In some of the cases it is suggested that while such admissions are competent they are not conclusive against the sureties. [McShane v. Howard Bank, 73 Md. 135.]

There is also a class of cases where an employee, principal in a bond on which suit is brought, is required by his official duties to make regular or occasional written statements or reports to his employers. Such statements and reports are always held to be part of the *res gestae* and admissible against the sureties. [United State v. Gaussen, 86 U. S. 198, l. c. 213-14;

Savings Bank v. Denker.

Trustees v. Cowden, 240 Ill. 39.] In some cases where statements are made before the particular delinquency under consideration has been discovered and becomes a matter of discussion, that situation is emphasized as making them a part of *res gestae*. In many jurisdictions it is held that oral admissions made in connection with explanations of these regular statements made in the course of duty, are held admissible against the sureties. Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 64 Am. St. Rep. 475, was an action on a servant's bond. When his employers examined the books and accounts of his agency while he was still the agent of the plaintiff, "his admissions accompanied such examination," and were held to be admissible against the sureties as part of the *res gestae*.

The case of Federal Surety Co. v. Ind. Mfg. Co., 176 Ind. 328, was where the treasurer of the plaintiff in a suit upon his bond made an admission to a witness concerning previous transactions, and it was held to be admissible and prima-facie evidence against the surety.

Hall v. U. S. Fidelity & Guaranty Co., 77 Minn. 24, was a suit on the bond of an employee against his sureties. Another employee was sent to complete a transaction begun by the principal in the bond. In examining the books relating to the transaction the principal in the bond made admissions which were held to be competent against his sureties. The court held that these admissions were part of the *res gestae*, and said (l. c. 27): "A part of Newton's duty was to account for the money received by him as plaintiff's agent. Defendant guaranteed Newton's fidelity in making that accounting as much as he did his fidelity in any other part of his duty as plaintiff's agent."

The case of Bank of Brighton v. Smith, 90 Am. Dec. (Mass.) 144, was an action by a bank against the sureties on the bond of its cashier. While the cashier was still filling the office he presented to the directors a written statement which purported to show the condition of the bank at a certain previous time. He made

certain verbal admissions showing that the accounting then rendered was false. These admissions were held to be properly received in evidence against the sureties.

So far as we can find, there are no late cases, determined in this State, where the question has been considered. Several early cases are cited. The case of State to use of Squire & Reed v. Bird, 22 Mo. 470, is an action on a constable's bond. Plaintiff was allowed to prove admissions made by the constable concerning the collection of a note for the proceeds of which the constable failed to account. The court held that the admission of the constable was inadmissible against the sureties and was not a part of the *res gestae*, being merely a narration of the affair.

The case of Blair v. Perpetual Ins. Co., 10 Mo. 350, was a suit upon a bond of an agent of the Insurance Company. The court, almost in the language of Greenleaf (Sec. 187), says in the opinion: "The inquiry has been whether the declarations were made, in the course of the business for the performance for which the surety was bound, so as to become a part of the *res gestae*." And then adds that statements made *after the dismissal* of the principal would not be admissible in evidence against the sureties.

The case of Cheltenham Fire-Brick Co. v. Cook, 44 Mo. 29, was an action on the bond of the treasurer and bookkeeper of the plaintiff on account of the shortage in his accounts. Admissions of the principal were under consideration and the court said (l. c. 37): "The relation of principal and surety did not exist between him [surety] and the principal of the bond at the time the admissions were made. They were not made in the progress of any business intrusted to Theodore by the defendant, and formed no part of the *res gestae*."

The case of Union Savings Association v. Edwards, 47 Mo. 445, was an action by the plaintiff against its teller upon his bond. It seems from the evidence mentioned in the opinion that the defaulting teller made two different admissions to different persons regarding the speculations by which the money was lost. One of these

Savings Bank v. Denker.

statements made after he was discharged, was admitted by the trial court and this court held (l. c. 449) that the evidence was incompetent against the sureties; but further the court said (citing Greenleaf, Section 187) on the same page:

“Therefore the admissions which Edwards made to Rutherford, the president of the bank, when the default was first discovered, were competent evidence against him and his sureties because they formed a part of the *res gestae*, and were made while acting in the course of his official duty; but they would not be competent against the sureties *after* his official duties had ceased.”

The case of *Father Matthew, etc., Society v. Fitzwilliam*, 12 Mo. App. 445, discussed the doctrine at some length. The suit was on the bond of Fitzwilliam as treasurer of the plaintiff, the duties of which office he performed during part of the year 1876. During part of that year he was in bad health and absent a while; a committee and a treasurer *pro tempore* was in charge in November, 1876. The plaintiff, “after many attempts, got from Fitzwilliam a statement which showed his receipts and disbursements.” The Court of Appeals held the statement was competent, using this language, l. c. 449: “We think that exhibit 2 was competent. It was an accounting made by Fitzwilliam as treasurer in discharge of the duties of his office. It purports to show only the individual transactions of Fitzwilliam, without taking into account at all any receipts or disbursements of those who took his place during his absence. The constitution of the society requires the treasurer to report monthly the condition of the treasury, and to make an annual statement. This statement includes no time not covered by the bond in suit; and though it was made by Fitzwilliam after his removal for misconduct, it was made in pursuance of his duty as treasurer, during the term for which he was elected, and which was covered by the bond of defendants, and it is an express condition of their bond that

such a statement shall be made at the expiration of the treasurer's term."

That case as approved by this court, 84 Mo. 406, is the last utterance of this court upon the subject, so far as we are able to find, and places this court squarely in line with the authorities cited above which hold that a statement made by the principal during the continuance of a term for which the sureties are bound concerning any transaction during that period is admissible. The bond in that case required him to make monthly reports and to make an accounting at the end of his term. The statement, apparently, was not a regular report required of him by his duties. It was obtained after his discharge and after repeated attempts by his principal to secure it.

In the present case the conditions of the bond were that Mispagel "shall well and faithfully perform all the duties of such cashier either under his present appointment or under any further appointment," and the sureties were required to hold the bank harmless for any loss occasioned by any act of such cashier. While it is not shown that Mispagel was required to make definite, periodical reports to his employer, his duties necessarily implied that he should render an accounting to his bank or a statement of its condition whenever required to do so by the board of directors or officials of the bank, and particularly that he should fully explain its condition at the termination of his employment.

The objection that he was virtually out of office at the time he made this statement is fully answered by the Fitzwilliam case where the statement was made after the discharge but while the employee still had a duty to account. While Mispagel was brought to book by his employers on November 5th, and forbidden to make entries in the books or perform other responsible acts connected with the business, he was still the cashier of the bank. The fact that the sphere of his activities was limited by his employers' knowledge of his misconduct does not alter the fact that his duty remained to render an accounting to explain fully the

conditions of the bank as it had fared under his management.

We think, under the authorities, the evidence was properly admitted.

V. The principal defense urged against any recovery by the plaintiff is that the plaintiff knew that Mispagel had fraudulently attempted to conceal his **Knowledge of Dishonesty.** violations of duty by making false entries, by permitting overdrafts contrary to instructions; that Mispagel had fraudulently attempted to conceal his violations of duty by making false entries and that the defendants were ignorant of those breaches of duty and the plaintiff permitted them to sign the bond, fraudulently concealing from them the previous misconduct of which Mispagel was guilty. The evidence of knowledge on the part of the directors and officers of the bank that Mispagel had been guilty of misconduct, is treated by the referee as contained probably altogether in the unfinished and incompetent deposition of Theodore C. Bruere, Sr. The referee found against the contention of the defendant on that defense after admitting the deposition in evidence. His discussion of the case turns upon his theory of the law relating to such knowledge as that deposition seemed to show the officers had. Outside of that deposition the referee finds no evidence indicating that the directors and officers had any knowledge of Mispagel's dishonest practices, his false entries or concealment of the transactions by which the bank had lost money. He finds that the directors and officers of the bank were negligent in failing to keep more in touch with the business and acquaint themselves with the way things were going. For years he had been causing losses to the bank by allowing overdrafts and other dealings by which other persons had got the money of the bank. He had persistently and continuously concealed and covered up these transactions from time to time in a way which would have failed of its purpose if any great diligence had been exercised by the directors in the examination

of the bank's affairs. But the most that can be said of their conduct in this respect is carelessness and negligence; that they knew or suspected dishonesty on the part of Mispagel does not appear from the competent evidence.

Mispagel had presented bonds at various periods of his employment; the third and last one, which he presented January 2, 1904, is the one sued on here. It is not shown that the proposed sureties made any inquiries of the officers regarding Mispagel's character or capacity. He got his securities on his bond for the bank officials' approval and they approved it. If they had knowledge of Mispagel's dishonesty and retained him in office with that knowledge and accepted the bond with knowledge of dishonesty, without discovering what they knew of his character to his sureties, the sureties would not be liable on the bond. [Third Nat. Bank v. Owen, 101 Mo. 558, l. c. 582.] But as stated, the only thing that could be urged against them was that they were careless in failing to ascertain the character of the man whom they had employed as cashier. In that case the sureties cannot be excused from liability on the bond. [Hartford Fire Ins. Co. v. Casey, 191 S. W. 1072; State to use, etc. v. Atherton, 40 Mo. 209, l. c. 216-17; Farmers Bank of Deepwater v. Ogden, 192 Mo. App. 243, l. c. 247; Harrison v. Ins. Co., 8 Mo. App. 37.]

VI. The largest item showing shortages covered up by Mispagel, amounting to \$18,596.10, was represented by the item of \$20,000 sued on, and a credit of \$1,403.90 to reduce the amount. This \$20,000 was explained by Mispagel in his confession as caused by drafts drawn by one W. J. Baird, directed to the Connery Commission Company, and cashed by Mispagel in the St. Charles Savings Bank.

The statement of Mispagel identified a number of drafts of the character mentioned, dated in October and September of 1904, the most of them for \$5,000, but ranging from \$2300 up to \$6100. These, Mispagel explained, represented cash of the St. Charles Savings

Losses in
Former Years.

Savings Bank v. Denker.

Bank, paid to Baird. The total amount of all the drafts was more than double the amount of this item; some of them were renewals of similar drafts, drawn in the same way. It seems none of them ever was paid by the party on whom they were drawn and were returned to the bank, and, as stated by Mispagel, \$20,000 represents the amount lost at the bank during the year.

Appellants argue that notwithstanding the explanation of Mispagel, assuming it to be competent evidence, it is not shown that these drafts represent \$20,000 taken from the assets of the bank during that year 1904, but they argue the inference is reasonable that they were used to cover up shortages which had been caused by the misconduct of Mispagel in former years. The evidence is quite positive that the money was paid out and lost during the year 1904. The referee, on the evidence, found that to be the case, and we think the evidence fully supports the finding.

VII. The four remaining items of shortage found by the referee are attacked by appellant. The first item of \$504.12, called the "interest item," consists of sixty or seventy small items extending from January 2 to October 14th, showing where Mispagel would collect interest and make false entries of the amounts collected. He would collect the interest earned on different notes at different dates and enter in each case on the books a less amount, sometimes a few cents and sometimes a few dollars less, the total of all the differences between the amount collected and the amount charged being the above sum. There seems no reasonable objection to the finding of the referee that these items represent a loss to the bank in the amount mentioned, during the life of the bond.

The second and third items were represented by two drafts. As cashier of the St. Charles Savings Bank, Mispagel, on February 13, 1904, drew a draft of three thousand dollars upon the American Exchange Bank of St. Louis, payable to the order of the Beaumont National Bank. He entered this on the stub of the

draft of the St. Charles National Bank as \$3.00; on February 19, 1904, he drew a draft on the American Exchange Bank of St. Louis for \$800, payable to the order of Dillon & Crandall Bond & Stock Company, and entered it on the stub-book of the plaintiff bank as eight dollars. These drafts were paid by the American Exchange Bank of St. Louis a few days later. Referee found on the evidence that the amounts were lost to the plaintiff bank during the year.

The appellant excepts to this finding and assigns error here to the action of the trial court in sustaining the finding of the referee on the ground that the evidence fails to show a loss to the plaintiff bank by reason of these drafts. The plaintiff always carried a deposit with American Exchange Bank and during the period under consideration Mispagel made the books always show a larger balance with that bank than it actually had. This was true of other banks where plaintiff had deposits. These shortages varied from time to time as the exigencies of Mispagel's frauds required. The evidence shows that the shortage of the plaintiff's account with the American Exchange Bank of St. Louis was less in November 7, 1909, when the malfeasances of Mispagel were uncovered, than they were in January of that year. It is argued that, since the discrepancy between the amount the bank had on deposit with the American Exchange Bank and what the books of the plaintiff bank showed it had, was less at the time the bond was signed than when Mispagel was discharged, for that reason there could have been no shortage there.

The fact that the drafts were paid and the plaintiff's deposit in that bank thereby depleted showed a loss. If the shortages varied from time to time, either before or after the drafts were actually cashed, by replacing other shortages, or shifting the deficit from the account of one bank to that of another on plaintiff's books, that would not tend to rebut the actual proof of loss at the time the drafts were paid. Appellant claims further that it is possible that the drafts represented no loss to the bank, because they might have been sold to

Savings Bank v. Denker.

customers for money which was received over the counter. Of course such a thing was possible, but there was no evidence of it.

Appellants further claim that, taking all the correspondents of the plaintiff bank, the accounts of some of them showed an increase and some a decrease in shortages during the year; but that, taken together, the accounts with correspondent banks showed less shortages at the end of the year than at the beginning, and for that reason a shifting of the accounts would not explain the decrease, and that the evidence still fails to show there was a loss during that time.

The evidence respecting these matters is not set out in full in the abstract, although the appellant asks the court to review the evidence as a case in equity. It is abbreviated and summarized, and in some instances conclusions from the testimony stated. It is sufficient to say of this point that Mispagel probably did not limit his shifting of shortages to the accounts with other banks. His acknowledged skill in camouflage could very well have enabled him to make such shortages appear and disappear from time to time in individual and other accounts in the bank. The money was actually paid on those drafts out of the plaintiff's funds at the time they were presented.

The evidence we think was entirely sufficient to justify the finding of the referee that the loss occurred as indicated.

The remaining item, \$135.47 raised note, is explained by the referee at length. The appellants state that they have not presented the testimony with respect to it, therefore this court will not review the matter.

The judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur; Faris, J., in result.

THE STATE ex rel. WILLIAM G. KELLY et al. v.
GEORGE E. HACKMANN, State Auditor.

In Banc, August 6, 1918.

1. **CONTRACT WITH STATE: Proof of Existence: Finding by Legislature.** A finding by the Legislature of a fact upon which the right to enact a law depends is not to be further inquired into by the courts. So where an appropriation act appropriated a definite sum of money to private persons "in full payment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds," and a contract for such a plan could under the statute have been made on behalf of the State with said board, it will be taken as true that an agreement was made between said persons and said board, under which the claim arose. And even if the court were to reserve the right to make an independent finding on the question of fact on the ground that the constitutionality of the act depends on a question of fact, the prior finding of the Legislature that such fact did exist would be treated as *prima-facie* true.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that the plan alleged to have been submitted was rendered voluntarily, with no implied or express obligation on the part of the board to pay therefor, if the services tendered were not accepted, and the Constitution prohibits the Legislature to appropriate money for a mere submitted plan.

2. ———: **Presumption of Validity: Judicial Question.** The courts will presume that the Legislature passed upon the validity of an agreement made by the board which was empowered to make it on behalf of the State, before it appropriated money to pay the obligation which it expressed, unless it is deemed a clear violation of the Constitution; but, nevertheless, the validity of the agreement is a judicial question, and the act making the appropriation to pay the claim will not be upheld if the agreement is one that the Constitution makes null and void.
3. ———: **Fund Commissioners: Power to Contract.** Section 11900, Revised Statutes 1909, which authorized and empowered the Board of Fund Commissioners "to enter into contracts, and to refund any part of the bonded indebtedness of the State," when read in connection with Section 11890, which authorized them to "perform all such acts and things as may be required of them by law," and the amendment of 1913 to Section 11900, which "authorized and empowered" said board "to enter into contracts and to refund," did

not restrict their duties to refunding bonds, but authorized them to make contracts for the sale of Capitol bonds authorized by the Act of March 16, 1911.

Held, by WALKER, J. dissenting, with whom BOND, C. J., and WOODSON, J., concur, that neither said statutes nor any other invested the board with authority to contract to pay for a plan to sell bonds voluntarily submitted to it and never accepted.

4. ———: **Necessary Incidents of Power.** In view of the inhibition of the Constitution (Sec. 24, art. 4) that the General Assembly shall have no power "to pay or to authorize the payment of any claim hereafter created against the State . . . under any agreement or contract made without express authority of law," the power of the Board of Fund Commissioners to enter into a contract relating to the sale of the State's bonds must be strictly construed, and no such broad meaning of the word "necessity" as "convenient" and "proper" is to be tolerated; but as the board was given express authority to sell the Capitol bonds and power to enter into contracts, they were also given, as necessary to the exercise of such power, the further power to enter into an agreement with private citizens to submit to them a plan to sell the bonds; and as the Legislature in an appropriation act recites that such plan was submitted, the act appropriating money to pay for the service rendered is not without express authority of law.

Held, by WALKER, J. dissenting, with whom BOND, C. J., and WOODSON, J., concur, that no appropriation act derives any operative force from its own terms alone, but something more, usually some statute, is necessary to authorize the withdrawal of money from the public treasury; and as the statute authorized the board to sell the bonds at the best advantage and required the proceeds to be applied exclusively to the building of a new capitol, furnishing the same and the acquirement of additional ground for a site, and the Constitution prohibits the Legislature to appropriate money in "payment of any claim . . . under any contract made without express authority of law," the Board of Fund Commissioners had no power to enter into a contract to pay for a plan to sell the bonds, and the General Assembly had no power to appropriate money to pay for a plan for their sale, voluntarily submitted by private persons and never accepted by the board, and no such power can be implied from the restricted language used, nor did any public necessity for the contract or the plan exist, and it is only when the public interest is involved that a necessity, as an incident to the power granted, can be said to exist.

5. ———: **Capitol Building Fund: Restricted Use.** The Capitol Building Fund having been increased from other sources than the proceeds of the Capitol bonds to an amount more than sufficient

State ex rel. v. Hackmann.

to discharge the obligation of a contract for a plan for selling the bonds, it cannot be held, as a fact, that an appropriation to pay said obligation is a diversion of the proceeds of the bonds, whose proceeds were by statute devoted to erecting a capitol, furnishing it and buying additional ground for a site; nor can it be held, as a matter of law, that the use of the proceeds to pay said obligation would be a diversion of them, since such payment was a necessary expense of floating the loan and therefore not an unlawful use of the proceeds. [WALKER, J., BOND, C. J., and WOODSON, J., dissenting.]

6. ———: **Grant to an Individual: Constitutional Inhibition.** The restriction of Section 46 of Article 4 of the Constitution inhibiting the Legislature from granting public money to an individual, is laid upon gratuitous grants. It does not prohibit payment for services rendered the State; for instance, it does not prohibit the Legislature to appropriate money to pay private citizens for a plan submitted to the Board of Fund Commissioners to sell a large issue of bonds.
7. ———: **Certification of Claim.** The State Capitol Commission was not entrusted with the sale of Capitol bonds, nor did it have anything to do with claims or demands incident to their sale, and consequently it was not necessary that it allow or certify a claim by private persons for a plan to sell the bonds submitted to the Board of Fund Commissioners.
8. **JUDGMENT: Allowance in Excess of Demand.** Where the Legislature appropriated \$25,000 to pay relator's demand, and they agreed with the Governor, prior to his approval of the act, to reduce their demand to \$20,000, and they asked for a writ to compel the State Auditor to issue them a warrant for \$20,000, and from a judgment against them in the circuit court they appeal, it would be inconsistent with the theory on which the case was tried and submitted in that court, for the Supreme Court to allow them \$25,000.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

REVERSED AND REMANDED.

George Kingsley, Reed & Harvey for appellants.

(1) Courts reluctantly declare unconstitutional any legislative enactment. State ex rel. v. Gordon, 245 Mo. 35; State v. Smith, 233 Mo. 264; State v. Railway, 242 Mo. 354. (2) The contention of the State Auditor that all

State ex rel. v. Hackmann.

the moneys in the Capitol Building Fund constitute a trust fund for the construction of the Capitol, the furnishing and equipment thereof, and that a warrant against the same cannot be drawn in favor of relators, and that attempt to do so would constitute an illegal diversion of the fund, is without merit. *Church v. Hadley*, 240 Mo. 692. (3) Section 59 is not in contravention of Section 20 of Article 10 of the Constitution. *Church v. Hadley*, 240 Mo. 692. (4) The contention of the State Auditor that the act of appropriation to relators is in contravention of Sections 46 and 48 of Article 4 of the Constitution is without merit. *Ex parte Renfrow*, 112 Mo. 591; *Cutcher v. Crawford*, 105 Ga. 180; *Waterloo v. Shanahan*, 128 N. Y. 345; *Stevenson v. Colgan*, 91 Cal. 649; *Kadderly v. Portland*, 44 Ore. 120; *Davis v. Gaines*, 48 Ark. 370; *Hanson v. Hodges*, 160 S. W. (Ark.) 395; *In re Senate Resolution*, 54 Colo. 270; *Oklahoma City v. Shields*, 22 Okla. 305; *Lavin v. Bacon*, 14 S. D. 405; *Farquharson v. Yeargin*, 24 Wash. 549; *Lusher v. Sitz*, 4 W. Va. 11; *DeCamp v. Eveland*, 19 Barb. 81. (5) The undisputed facts in the case and the findings of fact by the trial judge completely demolish the defense that there is no money available in the Capitol Building Fund with which to pay relators, and that any payment thereof impairs the obligations of contracts between the State of Missouri and Kelly & Kelly and other persons.

Frank W. McAllister, Attorney-General and *John T. Gose*, Assistant Attorney-General for respondent.

(1) In the extraordinary remedy of mandamus the following may be said to be elementary: (a) The writ is never granted in doubtful cases; (b) relator must establish his clear legal right; (c) where the underlying proceedings are unauthorized or illegal, the writ will be denied; (d) the writ will never issue where the act commanded would result in the violation of a constitutional provision. *High, Extraordinary Remedies*, p. 12; 26 Cyc. 150, 151; 19 Am. & Eng. Ency. Law (2 Ed.), 725; *State ex rel. v. Thomas*, 245 Mo. 71; *State ex rel.*

v. Appling, 191 Mo. App. 592. (2) A fund set aside by direct vote of the people for certain specific purposes is in the nature of a trust fund and cannot, by the General Assembly, be applied to any other purpose than that for which it was created, except by the consent of the people. In re Statehouse Fund, 19 R. I. 391; In re Statehouse Fund, 20 R. I. 707; Graham v. Horton, 6 Kan. 353; Trustees v. Bailey, 81 Am. Dec. 194; State ex rel. v. Cardozo, 28 Am. Rep. 274. (3) The act is violative of Section 20 of Article 10 of the Constitution. The Capitol Building Fund consists of moneys arising from a loan, debt or liability, and can only be applied to the purposes for which they were obtained, or to repay the indebtedness. The Legislature could not touch the fund for any other purpose. "Moneys arising from any loan, debt or liability contracted by the State shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise." Sec. 20, art. 10, Mo. Const. (4) The act is in violation of Sections 48 and 46 of Article 4, Constitution of Missouri. There was no express authority of law for a contract or agreement with the Fund Commissioners for the submission of a plan, consequently the Legislature had no power to pass the act in question. Sec. 48, art. 4, Mo. Const.; State ex rel. v. Walker, 85 Mo. 47. The alleged contract or agreement being null and void, there was no liability created against the State, and the act of the Legislature was in effect a mere grant or gift to an individual. Sec. 46, art. 4, Mo. Const. (5) The act violates the obligations of State contracts. No state shall pass any law impairing the obligation of a contract. Sec. 10, art. 1, U. S. Constitution. No law impairing the obligation of contracts can be passed by the General Assembly. Sec. 15, art. 2, Mo. Constitution. "The obligation of a contract is found in the terms in which the contract is expressed." Barlow v. Gregory, 31 Conn. 265. Existing laws which touch and affect the subject matter of a contract are as much a part of the contract as if they were expressly written therein. 6 Ruling Case Law, sec. 243, par. 855;

Armour Packing Co. v. United States, 209 U. S. 56; 14 L. R. A. (N. S.) 400; Kessler v. Clayes, 147 Mo. App. 95; McCracker v. Haward, 2 How. (43 U. S.) 611. Constitutional provisions which deny to the state the power to pass laws impairing the obligation of contracts apply as well to contracts made by the state as to those made by individuals. Dartmouth College v. Woodward, 4 Wheat, 519; Cooley's Const. Limitations (6 Ed.), sec. 329; New Jersey v. Wilson, 7 Cranch, 164; Fletcher v. Peck, 6 Cranch, 135; Hartman v. Greenhow, 102 U. S. 672.

GOODE, Special Judge—An alternative writ of mandamus was issued June 12, 1917, by the judge of the circuit court of Cole County, commanding the respondent, as State Auditor, to sign and deliver to the relators, Kelly & Kelly, a warrant for twenty thousand dollars upon the Capitol Building Fund of the State, or to show cause in term time, for refusing. The writ was granted upon a petition containing these averments: The petitioners were partners under the style of Kelly & Kelly; the sum of twenty thousand dollars was appropriated to them out of the Capitol Building Fund by the General Assembly at its last session to pay money due petitioners by the State of Missouri; said appropriation was part of the General Appropriation Act and was approved by the Governor; prior to his approval petitioners agreed with him to reduce their claim to twenty thousand dollars; petitioners were and are willing to accept the State Auditor's warrant for that sum in satisfaction of the appropriation, had so advised him and had demanded that he issue a warrant in petitioner's favor in accordance with the terms of the appropriation, but he had refused.

The item of the General Appropriation Act of April 11, 1917, on which this proceeding is based, reads:

"There is hereby appropriated out of the State Treasury chargeable to the Capitol Building Fund the sum of twenty-five thousand dollars for the relief of Kelly & Kelly of Kansas City, Missouri, in full pay-

ment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds." [Laws 1917, p. 21, sec. 59.]

That part of the Appropriation Act is the only evidence in this case of an agreement between relators and the State and of what the agreement was.

In his return to the writ the State Auditor set forth ten reasons why he had not issued the warrant in question and should not be compelled to issue it. They were in substance as follows:

A denial that the appropriation was to pay money due to the relators from the State, or that there was any money in the Capitol Building Fund to pay a warrant for the appropriation;

Averments that the Capitol Building Fund was in the nature of a trust fund, set apart by a vote of the people for these specific purposes, first, to build a new State Capitol; second, to furnish and equip it; third, to purchase any additional premises that might be needed as a site for the Capitol; that, therefore, the Legislature was without power to divert any part of the Capitol Building Fund to other purposes;

That as the Capitol Building Fund consisted of money derived from a liability contracted by the State, for the three purposes aforesaid, it could not be appropriated for any other than those purposes, or to repay the debt of the State, without violating Section 20 of Article 10 of the State Constitution. This section of the State Constitution provides, in effect, against the use of any money arising from a loan, debt or liability contracted by the State, for any purposes other than that for which the debt was contracted, or for the repayment of the debt;

That the appropriation for relators was contrary to the provisions of Section 48 of Article 4 of the Constitution, which reads: "The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or

contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

That the appropriation amounted to a grant to the relators of public money, in violation of the inhibition of Section 46, Article 4, of the State Constitution;

That the appropriation impaired the obligation of contracts previously made by the State, for the construction and furnishing of the Capitol, and finally,

Averments to the effect that the claim of relators for which the appropriation was made, did not arise under a contract made with the State Capitol Commission Board, nor was the relators' demand allowed and certified by said board, in conformity to the act creating the board. [Laws 1911, p. 108 et seq.]

A replication in the form of a general denial of the return was filed.

At the hearing in the circuit court it was admitted there was then in the Capitol Building Fund \$707,844.87; that said fund (i. e. the amount then in it and what had been in it) consisted of the proceeds of the sale of bonds of the State authorized by act of the General Assembly (see Laws 1911, pp. 406-417), together with funds placed in it under Section 16-A of the Act of the General Assembly relative to contingent and incidental expenses for years 1915-1916 (Laws 1915, p. 9). It was admitted the additional sum of \$27,500 had been transferred to the Capitol Building Fund pursuant to said Section 16-A (Laws 1915, p. 9) and that \$21,000 derived from the rent and sale of buildings on the Capitol grounds had been added. There were admissions relative to submitting to the popular vote the Act of March 16, 1911 (Laws 1911, pp. 416-417), providing for contracting a liability of the State through an issue of bonds to a maximum of three and a half million dollars, to provide

means to build a capitol, furnish and equip it and purchase additional premises for it; that the act of submission was approved March 24, 1911 (Laws 1911, pp. 250-254); and that the bond issue, for the purposes mentioned, received a two-thirds majority of the voters voting at the election.

Evidence was put in by the respondent to show contracts the State was under for building the Capitol and the amount of the State's liability under them; also that other contracts would be necessary in the future in order to complete, light and furnish the Capitol.

The trial court found that when the Appropriation Act was approved and at the time of the hearing, there was enough money in the Capitol Building Fund to pay a warrant for \$20,000 in favor of relators, and that, too, without impairing the obligation of any contract in existence when the appropriation was approved or when the cause was heard.

The alternative writ was quashed in the circuit court and relators appealed.

By way of further explanation we state that the issue of State bonds to construct, furnish and equip a new capitol building was authorized by an Act of the General Assembly approved March 6, 1911. (Laws 1911, p. 416). That act provided for the contracting of a liability of the State by an issue of bonds, not to exceed three and one-half million dollars, for a submission of this act to a vote of the people as required by Section 44, Article 4, of the State Constitution, prescribed the denominations of the bonds, mode of authenticating them, and further provided as follows: "Said bonds, when so prepared and executed under the supervision of the State Board of Fund Commissioners, shall be sold to the best advantage by said board, but not for less than par. The proceeds of said sale or sales shall constitute a fund to be designated as the Capitol Building Fund, and shall be applied exclusively to the building of a new state capitol at the present seat of government of the State, including the furnishing and other equipment of said building and the purchase by

the State of additional capitol premises adjoining those now owned by the State;" and further that "contract or contracts for expenditures to carry out the purposes of this act in excess of said three and one-half millions of dollars, with interest collected thereon, shall, to the amount of said excess, be illegal and void and forever non-payable." An act submitting the foregoing act to a popular vote was approved March 24, 1911 (Laws 1911, p. 250).

The proposition mainly relied on by respondent as a defense is, that the appropriation to pay the claim of relators violated that clause of the State Constitution quoted above, which forbids the General Assembly to pay or authorize the payment of a claim created against the State under any agreement or contract made without express authority of law, and declares all such unauthorized agreements and contracts shall be null and void. The claim of relators is of a kind that could only accrue from a contract, and whatever may have been the contract out of which the claim arose, it must have been made between the relators and the State acting through the Board of Fund Commissioners, as it is apparent from the recital in the Appropriation Act that the purpose of the particular item was to pay relators for a plan for the sale of the State Capitol bonds, submitted by them to that board. Moreover, if a contract of the kind in question was possible, it could only have been made with the said board, which was the body of officials charged with the task of selling the bonds, by the act that authorized them.

There are two inquiries to be answered in determining whether or not the claim of relators was created against the State under a valid agreement. *First*, is there proof in the record that an agreement was entered into by the relators with the Board of Fund Commissioners for the former to submit a plan to sell the bonds? *Second*, if there is, did the board possess express authority of law to make the agreement, or was it a mere nullity for lack of authority?

In cases where the courts have reserved the right to make an independent finding of facts when the constitutionality of a statute turned upon a question of fact, the prior finding of the Legislature was treated as prima-facie true. [N. Pac. Ry. v. N. Dakota, 216 U. S. 579; Judson, Interstate Commerce (3 Ed.), p. 224.] And there is abundant authority in this State and elsewhere for holding that a finding by the Legislature of the existence of a fact upon which the right to enact a law depended, is not to be further inquired of by the courts. [Ex parte Renfrow, 112 Mo. 591; and cases cited in opinion.] So we will take it as true that an agreement was made between the State and relators under which their claim arose. We should presume, too, that the Legislature passed upon the validity of the agreement before making the appropriation in controversy. Nevertheless, that question remains judicial, the legislative decision being so far respected that the act passed to pay the claim based on the contract, will be upheld by the court, unless deemed to be a clear violation of the Constitution. The constitutionality of statutes, other than those of a political character, must be judicially determined, when called into question in litigation, as has been often decided in cases like the present. [State ex rel. v. Walker, 85 Mo. 41; State ex rel. v. Dierkes, 214 Mo. 578, 587.]

Proceeding to the inquiry whether it was possible for the contract in controversy to have been made by express authority of law, we note that the Board of Fund Commissioners is composed of the Governor, Auditor, Treasurer and Attorney-General, and that it is part of the Treasury Department, created by an act of the Legislature approved March 25, 1891. [Laws 1891, p. 16.] This act, as amended in a few particulars, constitutes the 3rd Article of Chapter 121 of Revised Statutes of 1909. One amendment was made to provide a plan to refund the State Capitol bonds (Laws 1913, p. 772); but we do not consider the change thus made as controlling the decision of the point in this case which arises on the act. The 13th section of the Law as it

was passed in 1891 and which is now Section 11900, Revised Statutes 1909, reads as follows:

“The Board of Fund Commissioners are hereby authorized and empowered to enter into contracts, and to refund any part of the bonded indebtedness of the State, whenever they can do so to the advantage of the State in reducing the rate of interest of the outstanding State bonds, and to this end they are authorized and empowered to cause new bonds to be prepared, issued, sold or exchanged for outstanding bonds of such denominations, dates and rate of interest as they may deem proper, payable at such times and places, principal and interest, as they may agree upon as being to the best interests of the State: *Provided, always*, that the rate of interest of said bonds to be issued shall not exceed three per centum per annum, and that such ‘refunding bonds’ fall due, or become redeemable at the pleasure of the State, at such dates as will permit the redemption or payment, at par, of at least two hundred and fifty thousand dollars of the bonded debt of the State every year, until all of the bonds of the State are paid off. All bonds or State certifications of indebtedness hereafter issued by this State under the direction of the Board of Fund Commissioners shall be signed by the Governor, countersigned by the Secretary of State, with the great seal of the State attached, and the coupons for interest shall have a facsimile of the State Treasurer’s signature engraved thereon. The bond shall be registered by the State Auditor, to which he shall certify on each bond, and authenticate such registration by his signature and his official seal attached.”

That section was altered, as stated, in 1913, by inserting certain provisions about the State Capitol bonds. The question is whether the clause authorizing the Board of Fund Commissioners to enter into contracts, conferred on the board the right to make contracts regarding any duty that might be committed to them by law, or only regarding the refunding of State bonds. Most of the section relates to refunding, but in a prior section (now Sec. 11890, R. S. 1909) it was pro-

vided that the Fund Commissioners should do "and perform all such acts and things as may be required of them by law," and various duties other than refunding duties were required of them; and in fact, they were charged with a supervisory control over the Treasury Department. The first clause of the 13th section (now Sec. 11900), which empowered the Fund Commissioners to enter into contracts, instead of reading that the board was authorized and empowered to enter into contracts to refund, etc., reads that they are "authorized and empowered to enter into contracts and to refund," etc. The only reason for thinking the right to contract was given solely to enable the board to discharge their refunding duty is, that the right was given in the same part of the act that provided for those duties. But the Legislature contemplated from the first that the board should perform other duties, and duties which, as may be seen by reading the act, would call for agreements; for instance, the selection of a bank as fiscal agent for the State (3 R. S. 1909, sec. 11894). If it is held that the power of the commissioners to contract, given in the 13th section, was meant to apply only in refunding cases, then on the maxim that the mention of one thing inferentially excludes others, it could be argued that the commissioners were without power to make contracts, whatever the necessity for them, as to any other task that might be imposed on them by law. The reasonable construction of the act is that the Legislature intended to vest this body of officials with authority to enter into contracts according to their judgment, not regarding any public matter whatsoever, but regarding any that might be entrusted to their management—to enter into such contracts as would enable them to perform, not only their refunding duties, but their other duties as well. As the selling of the Capitol bonds was given in charge to the Board of Fund Commissioners, it follows that the contract in question, entered into in connection with the effort to sell, was made by express authority of law, unless the right of the Fund Commissioners to contract in the particular

matter was withdrawn by later statutes; and there is none claimed to have that effect, except those that provide for the Capitol bond loan; particularly the clause requiring the bonds to be sold for not less than par.

In the case of *Church v. Hadley*, 240 Mo. 680, decided in 1911, this court, without passing upon the effect of said Section 11900, Revised Statutes 1909, held the Fund Commissioners had express authority to contract for help to sell the Capitol bonds, by reason of these facts: first, that their efforts to sell without help had demonstrated it was impossible to do so; second, the urgency of the need to sell in order that the State's archives might be safely housed. The two opinions in the case were both concurred in by a majority of the court, and the gist of them was that an emergency existed which created a necessity for help in selling the bonds, "and that such necessity is within the intendment of the statutes," namely, the statutes which authorized the bonds. The decision was based both on an interpretation of those statutes and on adjudications in other states wherein the right of officials to agree to pay a commission for the sale of public securities was held to have been conferred by laws authorizing them to sell. [*Armstrong v. Village of Fort Edward*, 159 N. Y. 315; *Mayor, etc. v. Sands*, 105 N. Y. 210; *Manitou v. First National Bank*, 37 Colo. 344; *State v. West Duluth Land Co.*, 75 Minn. 456.] It would be difficult to sustain the proposition that at common law, an agent appointed to sell property, as the Fund Commissioners were, was empowered merely by virtue of his appointment, to bind his principal by contracts with third persons to help him sell, even if it should turn out that he could not sell without help. [2 Cor. Jur., p. 595, and note 13; 9 Cor. Jur. p. 519, and note 95; *Mechem, Agency*, sec. 357; *Atlee v. Fink*, 75 Mo. 100; *Carroll v. Tucker*, 2 N. Y. Misc. 397.] Nor did the decision in *Church v. Hadley* announce as a rule of general application, that agents might do this; but, instead, took pains to declare that the decision stood on all the facts of the particular case

(l. c. 706). The exact question determined therein was as to the right of the Fund Commissioners to agree to pay a broker's commission for sale of the bonds, whereas here the question is of their right to contract for a plan to sell the bonds. In our judgment, the difference between the two agreements does not call for a different rule of decision in the present case, inasmuch as both agreements were expedients resorted to by the Fund Commissioners as necessary, in their judgment, to enable them to perform their duty to sell the bonds—the identical issue of bonds and the same conditions existing in each instance.

The argument is pressed at this point that in *Church v. Hadley*, the court was not dealing with an appropriation to pay a claim against the State, and was neither bound to nor did consider the provision of Section 48, Article 4, of the State Constitution, which forbids the payment of any claim against the State created under a contract made without express authority of law. It is true, there was no discussion in the opinion of that clause of the Constitution, but the court carefully inquired as to the authority of the Fund Commissioners to agree for the help of brokers, and found such authority was part of the express grant of power to the commissioners to sell the bonds. It is appropriate to refer here to cases which support that doctrine by analogy and to others which support it by judgments directly in point. It will be conceded that the power of

officials charged with a ministerial duty are strictly construed and that such broad meanings of the word necessary (namely, "convenient" or "proper") as have been adopted in ascertaining from grants to legislative bodies what powers passed by implication as necessary to the effective use of those mentioned (*M'Culloch v. Maryland*, 4 Wheat. 316) have not been accepted (*Mechem, Public Officers*, secs. 511, 522; *State v. Bank of Missouri*, 45 Mo. 528, 538; *Whiteside v. United States*, 93 U. S. 247, 257). But tried by the strict meaning of "necessary," some powers not mentioned will pass by a grant, just as an

Necessary Incident.

appurtenant easement will go with a conveyance of an estate though not mentioned in the deed. [Kent v. Waite, 10 Pick. 138.] A statutory appropriation of funds to a Highway Commissioner, wherewith to build roads, expressly carried the right to purchase materials and tools for use in building, though nothing was said in the statute about purchases for that purpose, whereas they were directed to be made for the repair of roads. This was decided in construing a constitutional clause like the one in hand. [Townsend v. Gash, 267 Ill. 578.] And dealing with the same provision, it was held that supervisors charged to inspect the books and accounts of county officers were expressly given the right to hire an expert accountant, for the reason that, as they were not experts, it was impossible otherwise for them to perform their task. [Harris v. Gibbins, 114 Cal. 418.] Supervisors appointed to examine and allow accounts are thereby empowered to reject accounts, and a commission to erect a public building carries the right to engage for labor and material. [People v. Supervisors, 9 Wend. 508; Danolds v. State, 89 N. Y. 36.] Implied or incidental powers like those examples, can be derived from an express grant without extending the word "necessary" beyond its usual meaning of an indispensable condition or requisite; and, as the implied powers are considered to have been embraced in the grant, without ignoring the meaning of "express" in the law as the antithesis of "implied."

In the light of the foregoing arguments and precedents, we think the constitutional provision in question was not adopted with the intention to abrogate the doctrine of the common law that incidental powers may accompany the grant of an express power, as necessary to the exercise of the latter; but to enforce the rule of strict construction in determining what agreements public agents and officials are given the right to make, in connection with the performance of some duty imposed on them, when such subsidiary agreements are not mentioned in the law imposing the duty.

Moreover, though the court in *Church v. Hadley* did not determine the effect of the constitutional provision in hand, upon the right of the Fund Commissioners to contract for help in selling the bonds, it did determine, as said before, that they had the right to do this by virtue of the statute which directed them to sell; and the court having so determined, it follows, of course, that an appropriation to pay for the assistance thus procured would not be unconstitutional, on the ground that the contract was made without express authority of law.

The second and third answers in the return present, in two phases, the proposition that the Capitol Building Fund consists of the proceeds of the Capitol bonds, which proceeds had been devoted by the statutes authorizing the bonds to the threefold purpose of erecting a State capitol, furnishing and equipping it and buying premises to enlarge the site; that the loan had been ratified by the voters of the State upon the condition that the proceeds of it should be thus used, and therefore a diversion of any portion of the proceeds to another use would be unlawful. In support of this proposition as a general rule of law, independent of any constitutional inhibition, several decisions are cited, and as enforcing the same rule, a clause of the Missouri State Constitution. [In re State House Fund, 19 R. I. 391, 20 R. I. 707; *Graham v. Horton*, 6 Kan. l. c. 353; *Trustees v. Bailey*, 81 Am. Dec. 194; Mo. Constitution, art. 10, sec. 20.] There are two answers to this contention, one of fact, the other of law. The evidence in the record, and indeed the admission of the parties, show that the Capitol Building Fund, against which the appropriation for relators was made, has been increased from other sources than the proceeds of the Capitol bonds, to an amount more than sufficient to discharge the appropriation. Besides, the effect of the decision in *Church v. Hadley* is that one of the purposes in contemplation when the Capitol loan was made, was payment of the necessary expense of floating the loan out of its proceeds, and therefore such

**Proceeds
of Bonds.**

payment would not be an unlawful use of the proceeds.

The language in which the General Assembly made the appropriation answers the contention that it was a grant of public money within the inhibition of Section 46 of Article 4 of the Constitution. The appropriation purports to be made to pay a claim of relators against the State for a plan submitted to the Board of Fund Commissioners to sell the bonds; that is, to pay for a service rendered the State, and one for which, so far as the last cited section of the Constitution is concerned, the Legislature might pay as lawfully as any other. The restriction of the Constitution is laid upon gratuitous grants of public money. [Stevenson v. Colgan, 91 Cal. 649.]

Public Money. The defense that the Auditor had no right to issue the warrant in question, because the State Capitol Commission Board had not allowed or certified relator's claim, calls for an interpretation of the act that provided for said board and defined its duties and the correlative duties of the State Auditor (Laws 1911, p. 108). The powers and duties of the board as given in the act relate to the acquisition of Capitol premises, selection of a place for the Capitol itself, contracts for its construction, and allowing and certifying to the Auditor bills in connection with those duties. The State Capitol Commission Board were not entrusted with the sale of the Capitol bonds, nor had they anything to do with claims or demands incident to their sale. Whatever expense might be incurred lawfully by the Fund Commissioners in selling, could be paid under a proper appropriation act, without previous action by the Capitol Commission Board.

Certification of Claim. The defenses of respondent that there was no money in the Capitol Building Fund to pay relators' claim, and that to pay it would impair the obligations of contracts made by the State, are answered by the findings of the trial court, which are supported by the evidence.

The demand of the relators made in their brief for relief to the amount of \$25,000 cannot be allowed in the

face of their agreement with the Governor to accept \$20,000, and their petition for a writ to compel the issuance of a warrant for the latter amount. This case is here on appeal, and it would be inconsistent with the theory on which it was tried and submitted below, to treat it as a proceeding to recover more than they originally demanded.

**Allowance
In Excess
of Demand.**

The judgment is reversed and the cause is remanded with direction to the circuit court to reinsert it in the docket and issue a peremptory writ of mandamus to the respondent to issue a warrant in favor of relators in the sum of \$20,000. *Faris, Williams and Graves, JJ.*, concur; *Walker J.*, dissents in separate opinion, in which *Bond, C. J.*, and *Woodson, J.*, concur.

WALKER, J. (dissenting)—I do not concur in the majority opinion. The Appropriation Act the validity of which we are called upon to determine in this case, is as follows:

“Sec. 59. *Relief of Kelly and Kelly.* There is hereby appropriated out of the State Treasury chargeable to the Capitol Building Fund the sum of twenty-five thousand dollars for the relief of Kelly & Kelly of Kansas City, Missouri, in full payment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds.”

It is not inappropriate to state generally, preliminary to a discussion of the facts in this particular case, that no appropriation act under our system of laws derives any operative force from its own terms alone. As we will demonstrate, something more is necessary to authorize the withdrawal of funds from the public treasury than a mere arbitrary declaration of the General Assembly for that purpose. This being true, we must look to other than this act itself in determining its validity. A confusion in terms may be avoided by keeping in mind that the appropriation will be referred to as “the act,” and the law it designates as creating the fund from which the appropriation is sought to be

made, as "the statute." To this statute we must look in determining the validity of the act. The pertinent parts of this statute necessary to the determination of the matter at issue are embraced in a few words. It confers power upon the Board of Fund Commissioners to sell the bonds therein provided for at the best advantage, but for not less than par. The proceeds arising therefrom are designated as the "Capitol Building Fund," to be applied exclusively to the building of a new State Capitol at the present seat of government of the State, including the furnishing and other equipment of said building. [Sec. 1, Laws 1911, pp. 250, 416.] The effect of the act is to appropriate a portion of the Capitol Building Fund to the payment of the claim designated therein. In the absence of a constitutional limitation, this would be sufficient to set the seal of legality upon an act of this character, because the Legislature is supreme within its own appointed sphere. This being true, the presumptive validity of its acts not only uniformly obtains, but continues until their invalidity is shown beyond a reasonable doubt. This rule of non-interference of the judiciary with legislative action, in harmony with the spirit and purpose of our institutions, has found frequent expression in our reports. Notably in the following cases: *State ex rel. v. Aloe*, 152 Mo. l. c. 477; *Edwards v. Lesueur*, 132 Mo. l. c. 430; *State ex rel. v. Wofford*, 121 Mo. l. c. 68; *State ex rel. v. Renfrow*, 112 Mo. l. c. 594; *Deal v. Mississippi Co.*, 107 Mo. l. c. 468. The rule as announced in these cases and many others of like tenor is clear and definite, leaving no room for controversy. In none of these cases, however, was the validity of an appropriation act involved. Such acts are hedged about with constitutional limitations with which the Legislature must comply to render them valid. When, therefore, an act of this character is submitted for judicial analysis, the presumption as to its validity will obtain at first view, as in the case of other enactments, but it should be scrutinized to determine if it conforms to the express requirements of the Constitution. Such scrutiny in

nowise interferes with the authorized freedom of legislative action, but is nothing more than the legitimate exercise of an affirmative duty enjoined upon the judiciary—a duty imminently imperative where, as here, it is evident from the face of the act that its purpose is to appropriate part of a public fund created for a specific purpose, to the payment of a private claim. Furthermore, the fund from which this appropriation seeks payment was not created by the ordinary processes of taxation, burdensome at best, but under a statute which required the approval of the electorate to render it operative. The will of the people directly expressed as well as that of their representatives is therefore embodied in the statute. This statute creates a burden imposed solely on account of the exigency occasioned by a great public calamity; and in this creation it is not to be presumed, in view of the restrictions of the Constitution, that it was intended that the fund arising from a compliance with its conditions should be expended other than in accordance with its well defined terms. In a case of this character there is no room for presumptions. The restrictive limitations of the Constitution, therefore, necessary to be observed on construing the statute creating the Capitol Building Fund and, as a consequence, its application to the act of appropriation, demand our considerate examination.

Section 48 of Article 4 of the Constitution, so far as same is applicable to the matter at issue, is as follows:

“The General Assembly shall have no power to pay or authorize the payment of any claim hereafter created against the State, under any contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void.”

This provision is mandatory and like any other constitutional provision of like nature (*St. Joe Ry. Co. v. Shambaugh*, 106 Mo. l. c. 571) it inserts itself into all appropriation acts, and a compliance with its mandate is a prerequisite to their validity. What are the terms, therefore, of the statute upon which this act must rely

for its legality? Their repetition will but serve to emphasize their explicit purpose. They are that the Board of Fund Commissioners shall sell the bonds "from which the fund is to be created for not less than par," and that "the proceeds of said sale or sales shall constitute a fund to be designated as the Capitol Building Fund, and shall be applied exclusively to the building of a new state capitol at the present seat of government of the State, including the furnishing and other equipment of said building and the purchase by the State of additional capitol premises adjoining those now owned by the State." [Sec. 1, Laws 1911, p. 416.] This is the statute in its own words, omitting therefrom certain subsequent provisions which even with the longing eyes of private acquisition cannot with any regard for the acknowledged meaning of words be construed as having any pertinence to the matter at issue. We submit that the language of this statute contains nothing which can be construed as authorizing this appropriation even under the most latitudinary construction; but such a construction, the ultimate result of which is a reliance upon implied power, will not suffice to give legal life to the attempt made by this act, to divert a portion of this fund from the evident purpose of its creation. This for the reason of the unequivocal language of the Constitution, which prohibits any appropriation in the absence of an *express provision of law* authorizing the same. The language thus employed is neither finical nor redundant, but expresses in clear and forcible words the purpose of the framers of the organic law. The word "express" is employed in the limitation to exclude any power that might be sought to be exercised by implication. This is evident not only from the meaning of the word itself, but from its connection and the purpose intended to be effected by the adoption of this restriction. The reason of the law is the life of the law. This rule applies to constitutions as well as to statutes; and while this constitutional provision needs no gloss, a reference to the numerous acts

showing the indiscriminate appropriation of public money before the adoption of the present Constitution, will historically and indubitably demonstrate the reasons, not only for this limitation as well as others upon legislative action in this regard, but that the words employed in expressing it have been carefully chosen and were used with a well defined purpose. This being true, if we keep in view the purpose intended to be accomplished by the framers of the Constitution in this limitation, and we read the words according to their plain unmistakable meaning, the conclusion is inevitable that the power to make this appropriation, under the statute, did not exist.

A contrary conclusion finds no support in either the reasoning or the conclusion reached in *Church v. Hadley*, 240 Mo. 680. The argument is that case while recognizing the supremacy of the General Assembly in its own field as one of the co-ordinate branches of the government, nowhere holds that the courts may not with discriminating care and a quickened conscience, especially where the interests of the State are concerned, examine every act of the appropriation of public money submitted for their review to determine its validity. In so doing they but comply with a sworn duty, and in no respect do they interfere with legislative supremacy, which in this class of cases does not exist until after the acts have received judicial approval, if submitted for that purpose. The *Church-Hadley* case did not involve the construction of an appropriation act, and hence the provision of the Constitution (Sec. 48, Art. 4) affirmatively restricting legislation of this character was neither considered nor construed. The ruling in that case conferring power upon the Board of Fund Commissioners to pay a commission for the sale of the the Capitol Fund bonds was based upon public necessity, and properly so, and not upon any power to be inferred from the language of the statute. Confined to the latter, no rule of construction would have authorized the holding of such a power by implication. A recital of the facts in the *Church-Hadley* case will demonstrate the wisdom

and correctness of the conclusion reached therein, and by differentiation show that a like conclusion is not authorized in the case at bar. The proceeding was by injunction to restrain the Board of Fund Commissioners from paying a commission for the sale of Capitol Fund bonds, which, if granted, would have resulted in paralyzing all previous acts of the General Assembly and of the people to repair the loss occasioned by the burning of the State Capitol. The only act remaining unperformed to secure the necessary funds to repair the loss was the conversion of the bonds into cash. It was conceded that while the power of sale was conferred upon the board, it was unreasonable to conclude that its members could unaided accomplish this end. The court held, therefore, that the statute being full and complete in all other respects, and the State being confronted not only with great loss, but a serious interference with its functions unless the bonds were promptly sold, the board would not be restrained from effecting their sale in any manner it deemed most feasible, and if in its wisdom, it found it necessary to pay a commission to brokers to effect the sale, that this might be done. The decisive ruling in the case, therefore, whatever other matters may appear *arguendo*, is this (p. 707): that "the power to pay a commission springs only from an emergency creating such necessity, and that such necessity is within the intendment of the statute." Five of the judges concurred in this conclusion, *Valliant* and *Brown, JJ.*, not voting. Thus it will be seen that the ruling was based upon necessity, and not upon a power created by implication, and cannot be considered a precedent in the case at bar. The latter cannot be sustained upon the doctrine of necessity, because this can only be invoked when the public interest is involved. It cannot be urged as a moral claim, because the plan alleged to have been submitted was rendered voluntarily with no implied or express obligation on the part of the board to pay therefor, if the services tendered were not accepted. It cannot be urged on legal grounds, because the board

was without any authority to contract for such an offer, and as a consequence the claim forms no basis for a right of action, if the State could be sued. A claim of this character is contrary to usage, custom and business experience, of all of which we are authorized to take judicial notice. No enterprise of moment, whether it be the sale of public securities or an employment of a fiscal or industrial character, is ever inaugurated, especially by a state or subordinate municipality, in which competitive propositions for undertaking same are not required to be submitted. Heretofore, demands for compensation in such cases have been limited to those who, being employed, had rendered service. This claim is, therefore, a novelty even in the ever extending field of business activity, the moving impulse of which is to set a price on everything.

Liberal as our Legislatures have been in the appropriation of public money, the approval of a claim for an offer to perform a service for the State has heretofore been unheard of. Certain it is, that no claim such as this, in the very teeth of the Constitution, has received the sanction of the courts. Given judicial approval, it will set the pace for a most pernicious practice, and hereafter, not one, but all of the unsuccessful bidders for state employment, will seek legislative intervention to secure compensation, not for services rendered, but for plans proffered.

This claim, therefore, is not only unauthorized, but unconscionable, and it should not be approved. *Bond, C. J.*, and *Woodson, J.*, concur in this opinion.

AUGUSTA M. ZINKE v. KNIGHTS OF THE MACCABEES OF THE WORLD, Appellant.

In Banc, September 7, 1918.

1. **ACCORD AND SATISFACTION: Part Payment: Receipt in Full: Consideration: Doubt as to Amount Due.** A part payment of a debt unquestionably due will not discharge the entire debt, even though receipted in full and based upon an understanding or agreement

Zinke v. Maccabees.

that it is payment in full, for there is no consideration to support the agreement. But where there is an honest doubt between the parties as to the amount due, and after due consideration the creditor yields to the debtor's views and accepts what the debtor concedes to be due and gives a receipt in full, and there is no fraud or other ground for equitable relief, the settlement is binding, for the reason that it comes within the principle of accord and satisfaction.

2. ———: ———: **Consideration: Receipt Not Necessary.** To make a settlement binding on the creditor as an accord and satisfaction, neither a receipt in full nor even an agreement to accept a part for the whole is necessary, if the creditor knows there is reasonable doubt as to the amount due and accepts the part tendered in full satisfaction.

Certiorari.

WRIT QUASHED.

R. P. & C. B. Williams for petitioner.

Durham and Durham for respondent.

WOODSON, J.—Augusta M. Zinke brought a suit against the Knights of the Maccabees of the World to recover \$421.60, the balance alleged to be due her on a benefit certificate issued by it on the life of Ferdinand G. Zinke, her husband. She recovered judgment for the amount sued for, and the defendant appealed the cause to the St. Louis Court of Appeals, which affirmed the judgment of the circuit court.

After taking the proper preliminary steps the petitioner applied to this court for a writ of *certiorari* directed to the Court of Appeals, which was duly issued, and in due time return was properly made thereto.

No point is made upon the pleadings, so they will be put aside.

The facts are fairly stated by the Court of Appeals in the opinion written by it, which we here copy:

“Plaintiff instituted this action before a justice of the peace by filing a statement in which she claimed that she was beneficiary in a benefit certificate issued

Zinke v. Maccabees.

on the life of her husband, Ferdinand G. Zinke, in the sum of \$1000; that the insured departed this life during the time that said benefit certificate was in force, and that the association paid plaintiff the sum of \$578.40, leaving a balance of \$421.60 due plaintiff, which balance had been previously demanded and payment refused. From a judgment in favor of plaintiff in the justice court the defendant appealed. On a trial *de novo* in the circuit court before a judge and jury a judgment was entered in favor of plaintiff and against the defendant in the sum of \$421.60, and defendant in due course appealed.

“It is admitted that the defendant, Knights of the Maccabees of the World, is a corporation, successor to the Supreme Tent, Knights of the Maccabees of the World, and is a fraternal benefit association organized under the laws of the State of Michigan and authorized to do business in the State of Missouri; that the defendant had issued, on the life of Ferdinand G. Zinke, its policy No. 20,410, and that at his death one assessment on the membership, not exceeding in amount the sum of \$1000, was to be paid thereunder as a benefit to plaintiff, Augusta M. Zinke, wife of the insured, upon satisfactory proof of his death and the surrender of the said certificate; that one assessment on the membership of the defendant company at the time of the death of Ferdinand G. Zinke would have amounted to more than the sum of \$1000. The application of the insured for membership in the defendant order contained the following:

“I also agree that should I commit suicide in contravention of the laws of said Supreme Tent, whether sane or insane at the time, that this contract shall be null and void and of no binding force upon said Supreme Tent.

“This application and the laws of said Supreme Tent now in force or that may hereafter be adopted, together with my certificate of membership, are made the contract between myself and the said Supreme Tent,

Zinke v. Maccabees.

and I for myself and my beneficiary agree to conform to and be governed thereby.'

"Section 379 of the by-laws of the defendant in force and effect at the time of the decease of the insured provides that:

" 'No benefit shall be paid on account of the death of a member who shall die by his own hand, whether sane or insane; provided, however, that the beneficiary named in the life benefit certificate, or the person legally entitled to the benefit, shall receive an amount equal to twice the amount contributed to the Life Benefit Fund by the member during his lifetime, but not in excess of the face of the certificate.'

"There is no controversy but that Ferdinand G. Zinke, the insured, paid the defendant association in monthly rates on said certificate up to the time of his death \$289.20; that at the time of his death his dues to the association were paid, and that he was in good standing; that on or about the 5th day of June, 1913, some time after the death of the insured, the defendant association paid to Augusta M. Zinke, the plaintiff, the sum of \$573.40, being twice the amount of the monthly rates contributed to the Life Benefit Fund by Ferdinand G. Zinke during his lifetime.

"The record shows that the insured died on the 31st of March, 1913, and that the beneficiary, plaintiff herein, furnished the defendant preliminary proofs of death, consisting of her own affidavit, the affidavit of the attending physician, the verdict of the coroner's jury, affidavits taken at the coroner's inquest, and the sworn statement of the officers of the subordinate lodge of which the insured was a member. Each of these papers gave the cause of the death of the insured as suicide. The affidavit of the beneficiary contained the following: 'Date of death,—March 31, 1913;' 'Remote cause of death? Had trouble with his head for about six weeks;' 'Immediate cause of death? Not of sound mind, suicide.' The defendant association upon receiving the preliminary proofs of death issued its check, payable to the beneficiary, in the sum of \$578.40, which

is admitted to be double the amount the insured had paid in during his lifetime. This check, together with the receipt prepared by the defendant association, was sent forward to the officers of the local lodge, which it appears was customary, with instructions to turn the same over to the plaintiff upon the execution of the receipt.

"It appears that plaintiff did not accept the check immediately, but consulted the officers of the local lodge and her attorney, and took the matter under advisement for some days. Plaintiff's attorney advised her 'that if it should be found by a trier of the fact that suicide was the cause of her husband's death, that amount was all that was due under the policy. I advised her further that if he had not committed suicide, the full amount, namely, \$1,000, would be coming to her; also advised her concerning the necessary steps that it would take in order to test that question in the courts. I tried to put the whole facts and all the circumstances before her for her decision as to whether or not she would accept the amount offered, or fight for the full amount of the policy, \$1,000.'

"It further appears that there was no communication between the plaintiff and the defendant, from the date that defendant company mailed the check for \$578.40, together with receipt attached, to the officers of the local lodge. The receipt which plaintiff executed at the time she accepted the check, is as follows:

" 'Received from the Knights of the Maccabees of the World the sum of \$578.40, that being twice the amount of monthly rates contributed to the life Benefit Fund of Ferdinand G. Zinke, late a member of Tent No. 116, State or Province of Missouri, and the full amount for which the association is liable under its laws governing suicide claims. Warrant No. 34275.

" 'Augusta M. Zinke,

" 'Widow and Beneficiary of Ferdinand G. Zinke.'

"Plaintiff signed the above receipt on the 7th day of June, 1913, and thereafter, on the 21st day of July, 1913,

Zinke v. Maccabees.

wrote a letter in German to the defendant, of which letter the record states a correct translation to be as follows:

“ ‘Gentlemen of the Macabees:

“ ‘I ask again if the Gentlemen of the Maccabees will pay the rest of \$400, which I can claim under the Missouri law; if not, I will go to the courts. Why can rich people receive their money, where the husband shot himself, and have received their money of \$8,000, and a poor woman, who is without any help, shall be cheated? As my husband was already at the edge of the grave; that which he did, he did without knowledge, as he was always afraid of death.

“ ‘Respectfully

“ ‘Widow, AUGUSTA M. ZINKE.’

“On August 4, 1913, the defendant, through the Supreme Record Keeper, mailed the following answer in reply to plaintiff's letter.

“ ‘Mrs. Augusta M. Zinke,
St. Louis, Mo.

“ ‘Dear Madam:

“ ‘Your letter of July 21st, in relation to your husband's benefit insurance, has been received and in reply permit us to say that at the time your husband joined the Knights of the Maccabees of the World, the laws provided that in case of death by suicide, whether sane or insane, his beneficiary should be entitled to receive twice the amount he had contributed to the Life Benefit Fund. This was paid you in April, last. There is nothing more you're due under the laws of the State of Missouri, or under the laws of the K. O. T. M. or under any other laws. Your husband was a member of an association, acting together for the purpose of providing life benefits or insurance at the least possible cost; and among other things, they agreed that if any of them should commit suicide, his beneficiary should receive twice the amount he had contributed to the Life Benefit Fund, but in no case to exceed the amount of the certificate. We have no knowledge of what you are talking about, some rich man's beneficiary

getting \$8000, and if she did, or did not, it would not have any bearing in a case like this. She or he might have been entitled to it. The management would very much prefer that your husband had died in some other way so they could have paid it all. They have no interest in it except to carry out the agreements made by the members themselves.

“ ‘Respectfully yours,

“ ‘L. E. SISLER,

“ ‘Supreme R. K.’

“It is admitted that the plaintiff gave notice to the defendant prior to the institution of this suit; that the plaintiff did and would deny that the insured, Ferdinand G. Zinke, deceased, committed suicide, and that she claimed her statement in the original proof of death was erroneous and the result of mistake and misapprehension.”

Counsel for the petitioner contend that the opinion of the Court of Appeals is contrary and repugnant to the following cases: Scott v. Realty Co., 241 Mo. 112; McCormick v. City of St. Louis, 166 Mo. 315; Pollman Coal Co. v. City of St. Louis, 145 Mo. 651.

In addition to the facts stated, counsel for Mrs. Zinke introduced evidence tending to prove that she never stated to the notary or to anyone else that her husband committed suicide; also that he died of brain or heart troubles. The company upon the other hand introduced evidence tending to show she did state that her husband committed suicide, and that that was the cause of his death.

I. In our opinion the Court of Appeals has failed to follow the law as announced by this court in the cases cited. There can be no denial of the fact that a part payment of a debt unquestionably due will not discharge the entire debt, even though receipted in full, though based upon an understanding or agreement to that effect, for the reason that there is no consideration to support the agreement. But as was held by the cases cited, where there is an honest doubt between the parties

University City v. Schall.

as to the amount due, and after due consideration the creditor yields to the debtor's views and agrees to and accepts the amount which the latter concedes to be due and gives a receipt in full, and there is no fraud or other ground for equitable relief, the settlement is binding, for the reason that it comes within the principle of accord and satisfaction.

The receipt is not necessary, nor even the agreement to accept a part for the whole, where the creditor knows there is a reasonable doubt as to the amount due, and he accepts the part for the whole where the former is tendered in full satisfaction. *Torrey v. Hardy*, 196 S. W. 1100.

That there was a substantial doubt in the mind of the company as to the amount due Mrs. Zinke under the benefit certificate, there can be no doubt in the opinion of disinterested and fair-minded persons.

We are, therefore, of the opinion that the judgment of the Court of Appeals should be quashed, and it is so ordered.

Graves and Walker, JJ., concur; *Faris, J.*, concurs in result; *Bond, C. J.*, *Blair and Williams, JJ.*, dissent.

CITY OF UNIVERSITY CITY v. EDWARD G. SCHALL, Administrator of Estate of JAMES F. COYLE, Appellant.

Division One, September 16, 1918.

1. **CITY TREASURER: Custodian of City's Moneys: Agent of Council.** It is not necessary to discuss Section 9371, Revised Statutes 1909, declaring that "the mayor and board of aldermen shall have the care, management and control of the city and its finances," in view of the provisions of Section 9395, declaring that "the treasurer shall receive and safely keep all moneys, warrants, books, bonds and obligations entrusted to his care, and shall pay over all moneys, bonds and other obligations of the city on warrants or orders duly drawn, passed or ordered by the board of aldermen," and in view of a city ordinance declaring that the treasurer shall "pay over all moneys belonging to the city according to law," and in view of the further fact that the money actually passed into his hands

as treasurer. In such case he was not the agent of the mayor or board of aldermen, although they directed him to deposit the money with a certain trust company, subject to their control. The board has no power to interfere with the disposition of city funds which have passed into his hands as city treasurer, whatever its views of the statute may be, and could neither usurp his duties nor exonerate him from liability for city funds in his hands.

2. ———: ———: ———: **Public Policy.** Sound public policy does not permit a city treasurer to take into his possession in his name as city treasurer funds of the city of which he is treasurer, hold them for years in an account kept in his name as city treasurer, and when called upon for a balance, relieve himself by showing that the mayor and board of aldermen attempted orally to confer upon him the character of agent, so that he might hold the fund for them and withhold it from himself in his character as treasurer.
3. ———: ———: ———: **Shown by Oral Evidence.** Whether or not the action of the board of aldermen in authorizing the city treasurer to act as their agent in depositing the city's moneys may be shown by oral evidence need not be determined, if the board by ordinance duly passed had no power to exonerate him from liability for city funds which actually came into his hands as city treasurer.
4. ———: ———: **Special Deposit.** The writing of the words "special deposit" upon the book of the bank in which a city fund was deposited by the city treasurer amounted to nothing under the circumstances of this case, in which there was no suggestion made that the fund was to be segregated from other moneys of the bank and kept intact as a special deposit.
5. ———: ———: **Exoneration by Council: Account Stated.** The board of aldermen is powerless to exonerate a city treasurer from liability for the balance of a city fund deposited in a bank, where the amount of such balance is undisputed; and where there is no dispute as to the amount, the reports of the treasurer and the report of an auditing committee which examined one of them does not constitute an account stated.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

AFFIRMED.

John A. Blevins for appellant.

(1) Under the evidence it was a question for the jury as to whether the proceeds received from the sale

University City v. Schall.

of the bonds of the city were entrusted to the care and custody of Coyle, as treasurer. (2) Coyle was not responsible for any funds of the city not entrusted to his care as treasurer. Sec. 9395, R. S. 1909; Sec. 8531, R. S. 1909; McMillen on Municipal Corp., sec. 539; Borgnis v. Falk Co., 147 Wis. 327; State v. Grann, 40 L. R. A. 690; United States v. Thomas, 12 Wall. 337. (3) The mayor and board of aldermen had the care, control and management of the fund in question. Sec. 9371, R. S. 1909. (4) The evidence offered by defendant to show the action of the mayor and board of aldermen with reference to the control of checks and proceeds of the sale of the bonds and the deposit in the Trust Company was competent and its rejection by the court was error. Sec. 9371, R. S. 1909. (5) Parol evidence was admissible to show the action of the mayor and board of aldermen with reference to the funds, and the exclusion of the evidence of the witnesses upon that question was error. 28 Cyc. 343; Dillon on Municipal Corp., sec. 557; McQuillin on Municipal Corp., secs. 624 and 625; 17 Cyc. 506; Secs. 9320 and 9321, R. S. 1909. (6) The evidence established the fact that the account between the parties had been stated and settled and plaintiff could not, therefore, maintain this action. Sec. 9368, R. S. 1909; City Ordinance No. 28; 1 Cyc. 364, 367, 454; Lansing v. Woods, 57 Mich. 201; Union Bank v. Knapp, 3 Pick. 96; Allen v. Nettles, 39 La. Ann. 788; Rawlins v. Rawlins, 102 Mo. 567; Kronenberger v. Binz, 56 Mo. 121; Note L. R. A. 1917-C, p. 447; Note 29 L. R. A. (N. S.) 334. (7) In any event, Coyle was only bailee of the city's money and responsible for the failure to exercise reasonable care. Healdsburg v. Mulligan, 33 L. R. A. (Colo.) 461; Borgins v. Falk Co., 147 Wis. 327; Wilson v. People Colorado, 22 L. R. A. (Colo.) 449. (8) The Trust Company was solvent and the deposit of the money with said company was within the exercise of reasonable care. (9) The deposit of the bond money was a special deposit by agreement with the Trust Company and the title never left the city. Merchants Natl. Bank v. School Dist.,

36 C. C. A. 432, 947 Fed. 705; *Marine Bank v. Fulton Bank*, 2 Wall. 256; *Planters Bank v. Union Bank*, 16 Wall. 483. (10) Coyle did not receive any of the proceeds of the sale of the bonds and he did not profit one cent from the transaction. The mayor and board of aldermen interfered and actually controlled the funds and by so doing, relieved Coyle of liability. (11) This is not a suit upon the treasurer's bond. A different rule prevails where a suit is upon a bond given by a treasurer whereby he has obligated himself beyond that created by law. (12) The plaintiff city is estopped by its conduct and action and interference with the bond money to assert any claim against Coyle on account thereof. *Edward v. Kirkwood*, 147 Mo. App. 599; *McQuillin on Municipal Corp.*, secs. 629, 1916 and 1083; 29 Cyc. 476.

Rodgers & Koerner for respondent.

(1) The custodian of public funds is liable for money committed to his keeping, and lost through failure of the bank in which deposited. R. S. 1909, sec. 9395; *State ex rel v. Powell*, 67 Mo. 395; *State ex rel v. Moore*, 74 Mo. 413; *County of Mecklenburg v. Beales*, 111 Va. 691, 36 L. R. A. (N. S.) 287; 28 Cyc. 472; *State to use, etc. v. Reed*, 116 Tenn. 114. (2) Neither the mayor nor the board of aldermen of a municipality have any right to direct how, where, or in what manner funds in the hands of the treasurer shall be kept. R. S. 1909, secs. 9395, 9368, 9363; *Butler Co. v. Boatmen's Bank*, 143 Mo. 27; *Halbert v. State ex rel.*, 22 Ind. App. 125. The mayor and board of aldermen having no power in the premises, any direction they may have made was a nullity and it is no defense to the treasurer that he followed such direction. *English v. State ex rel.*, 61 Ind. 212; *Halbert v. State ex rel.*, 22 Ind. App. 125. (3) The board of aldermen was required to keep a journal of its proceedings. R. S. 1909, sec. 9320. Hence, the action of the board can be proved only by its records. *State v. Lawrence*, 178 Mo. 374; *Light & Water Co. v.*

University City v. Schall.

Lebanon, 163 Mo. 254; Kane v. School Dist., 48 Mo. App. 414; Surveying Co. v. St. Louis, 68 Mo. App. 187.

(4) The liability of the custodian of public funds is fixed by law. The bond given by him does not define his liability, but merely super-adds to his personal responsibility the security of his bondsmen. State to use v. Copeland, 96 Tenn. 326. (5) There is no element of estoppel in this case for the reason that Mr. Coyle had no right to act upon any representations the board of aldermen may have made to him. DeLashmutt v. Tettor, 261 Mo. 441. Furthermore, the board of aldermen had no right to make such representations, and there is no evidence that any such representations were made. Wheeler v. Poplar Bluff, 149 Mo. 36. (6) A special deposit is one made with the understanding that the identical money deposited shall be returned to the depositor. Butcher v. Butler, 134 Mo. App. 61; Bouvier Law Dictionary, p. 3098. The fact that the fund here in question was deposited in an interest bearing account and that subsequently a "profit sharing" certificate was accepted for the amount due, conclusively shows that it was not intended as a special deposit.

BLAIR, P. J.—James F. Coyle was treasurer of University City. Appellant is administrator of his estate. The city sued for a balance it alleges Coyle, as treasurer, owed it at the time of his death. The verdict was against the city. A new trial was granted, and the administrator appeals from that order.

The petition alleges the balance is \$28,197. It is stipulated this has been reduced by payment of over \$17,000 out of the assets of the People's Savings Trust Company. No point is made on the pleadings. One ground upon which the new trial was granted was that the verdict was "contrary to the law."

There is no dispute that bonds for \$100,000 were authorized, issued and sold, and that the checks for the proceeds were made out to James F. Coyle, Treasurer of University City; that he endorsed these checks for deposit with the People's Savings Trust Company, and,

in his own hand, made out the deposit slip used in that transaction; that the account was opened by the Trust Company in the name of James F. Coyle, as treasurer of the city, and always carried that way on its books; that the portion of the sum withdrawn, with the exception of one large item, was paid out on Coyle's treasurer's check or paid on warrants issued in the ordinary way and Coyle's check subsequently made to cover the payment. The city does not question the propriety of any of these payments.

Appellant offered oral evidence tending to show that the mayor and aldermen examined the statutes and concluded they had the right to control the fund; that they agreed they would do so; that they directed the deposit to be made in the Trust Company in Coyle's name as treasurer; that the Trust Company offered interest as high as offered by any other and was located in University City; Coyle, the mayor and some of the aldermen were directors of the Trust Company. The city attorney and Coyle took to the Trust Company the checks representing the fund in question; the account was opened, as already stated, and the notation "special deposit" was placed upon the books in connection with the account. A little later the Trust Company issued and delivered to Coyle a pass book marked on cover "Mo. 165, People's Savings Trust Co. By Mail Only. University City, St. Louis, Mo. In account with—Name, James F. Coyle, Treasurer—Town, University City, Mo." In this book appear the deposits, withdrawals and balances. The heading over them is: "Book No. Mo. 165. People's Savings Trust Co. In account with James F. Coyle, Treasurer University City, Mo." This book and other evidence show that the proceeds of the bonds went into this account. On March 24, 1910, the balance was \$61,793.16. On that date Coyle demanded the balance. The bank did not have it and Coyle accepted a certificate of deposit for \$50,000. This left \$11,793.16 in the account. Payments reduced the balance, and on December 3, 1910, Coyle surrendered his certificate of deposit, caused \$10,000 to be placed

in the account, and took another certificate of deposit for \$40,000. Under like conditions similar transactions occurred. On May 25, 1911, the account showed a balance of \$4419.63, and Coyle had in his possession a certificate of deposit for \$25,000. The body of the certificate read: "This certifies that Jas. F. Coyle, Treasurer of University City, Mo., has deposited in the People's Savings Trust Company the sum of twenty-five thousand no/Dollars, payable 6 mos. after date on return of this profit sharing certificate of deposit, properly assigned. This certificate is entitled to share in the profits as provided," etc. "This certificate is transferable only in person or by attorney upon the books of the company." This was subject to a contract as to the method of computation and payment of profits. The certificates of deposit previously issued to Coyle were of like character. Payments out of the fund were made on checks signed by Coyle and issued by him in payment of warrants ordered issued by the city council. Some payments seem to have been made by the Trust Company directly to the holder of the warrant. In such circumstances generally Coyle subsequently would issue his treasurer's check to cover such payments. There may have been instances in which no check was issued for payments made on warrants.

The answer avers and the evidence shows that Coyle's reports as city treasurer during the period from January, 1910, to the expiration of his term, contain no reference to the \$100,000 fund. They had reference to other funds of the city. The balance (about \$2,900) shown by these reports Coyle had paid over to his successors. He paid over no part of the \$100,000 fund. His bond was for \$5,000 and was executed prior to the issuance of the city bonds. The amount was fixed by ordinance.

It is established that the Trust Company placed the \$100,000 deposit with its other funds and paid it out as stated and charged itself with interest on the deposit and treated the deposit as it treated its ordinary de-

posits. The mayor was president of the Trust Company. The city attorney was connected with its legal department. Coyle was a director. The city clerk was its treasurer. Coyle made the deposit and knew, as a matter, of fact, all about the manner in which it was being managed. It never was treated as a special deposit. The Trust Company failed in 1911. Appellant's brief presents several questions.

I. It is contended the checks and money were never entrusted to Coyle's care. It is not denied the checks were made out and delivered to him and endorsed by him and deposited for collection by him, **City Treasurer.** and the account opened and carried by him, all in his name as city treasurer.

It is argued the evidence tends to show the mayor and board of aldermen took over the fund and Coyle acted as their agent in all these matters. Section 9371, Revised Statutes 1909, provides that "the mayor and board of aldermen . . . shall have the care, management and control of the city and its finances." This is relied upon to show that the board of aldermen had such care and control of the bond proceeds that they might retain custody of them to the exclusion of the treasurer. The question need not be discussed. Section 9395, Revised Statutes 1909, provides that "the treasurer shall receive and safely keep all moneys, warrants, books, bonds and obligations entrusted to his care, and shall pay over all moneys, bonds or other obligations of the city on warrants or orders duly drawn, passed or ordered by the board of aldermen," etc. The applicable city ordinance followed the language of the statute and provided that the treasurer should "pay over all moneys belonging to the city according to law." It is said the evidence tends to show the fund was not "entrusted" to Coyle's care as treasurer, but that he held it as "agent" of the board of aldermen. As pointed out, appellant proved beyond dispute that the money was in Coyle's possession and that all the checks and accounts show

it stood in his name as city treasurer. In our opinion, when he obtained such custody of the fund it was entrusted to his care in the statutory sense and he became responsible for it as treasurer. Concede the board might have retained the fund. It did not do so. It turned it over to Coyle, as treasurer, so far as all the records show. The board then had no power to select a depository for city funds of this character. It had no authority to interfere with Coyle's disposition of funds in his hands as treasurer. It was his duty under the statute to care for funds entrusted to him and respond in case of loss. Whatever advice the board or its members gave him as to a place of deposit, he acted upon it at his peril. The board's view as to its authority under the statute did not bind Coyle. It could neither usurp his duties nor exonerate him from liability for funds in his hands. If he saw fit to accede to a suggestion as to the place of deposit, whether made by the board or by its individual members, this cannot now be used to relieve him of responsibility which the law placed upon him in his official capacity. An ordinance regularly passed by the board and signed by the mayor could not have changed Coyle's status once he secured possession of this city money as city treasurer. We hold that sound public policy does not permit a city treasurer, in circumstances such as appear here, to take into his possession in his name as city treasurer funds of the city of which he is treasurer, hold these for years in an account kept in his name as treasurer and, when called upon for a balance, relieve himself by showing that the mayor and board of aldermen attempted orally to confer upon him the character of agent so that he might hold the fund for them and withhold it *from himself* in his character as treasurer. The easy evasion of liability a contrary holding would permit is sufficient answer to any argument in behalf of such a rule. It may be added that appellant's evidence as epitomized above establishes the fact that whatever effort was made to constitute Coyle agent of the board or city, it con-

clusively appears the fund was not, in fact, confided to him in that capacity. The records put this beyond dispute.

II. The question whether oral evidence of the action of the board of aldermen can be offered in the absence of a record of such action in a case like this need not be determined. In our opinion, the board **Oral Evidence.** could not, even by ordinance duly passed, have exonerated Coyle from liability for city funds shown to have been actually in his hands as treasurer of the city.

III. The writing of the words "special deposit" upon the bank book is of slight consequence. Interest was to be paid and was paid on the account. The necessary implication was that the funds would be employed by the Trust Company in the **Special Deposit.** usual way. The account was to be and was a checking account in the sense that current obligations payable out of the fund were to be paid and were paid out of it on checks and warrants in a customary way. No suggestion was made or thought of that the money was to be segregated from other moneys of the Trust Company and kept intact as a special deposit. The deposit had no single attribute of a special deposit. The writing of the words on the books amounted to nothing in view of the clear understanding that the account should be dealt with as it was. Further, we think the evidence, as a matter of law, shows Coyle, as treasurer, placed the money in the bank. His liability is absolute, under the rule in this and most other states. [State ex rel. v. Powell, 67 Mo. 395; State ex rel. v. Moore, 74 Mo. 413; County of Mecklenberg v. Beales, 111 Va. 691, 36 L. R. A. (N. S.) 285.]

IV. The reports of the treasurer and the report of an auditing committee which examined one of them constituted no account stated. As the answer avers, these reports did not include the fund in the Trust

In re Webers.

Company. There was no dispute about the portion of the fund expended and there is no such dispute now. There was no controversy about the fund. The board was powerless to exonerate Coyle by express action and, as a consequence, its action or lack of action respecting the reports made could not estop or affect the city.

The trial court was right in granting a new trial on the ground that the verdict was contrary to law. The order is affirmed and the cause remanded. All concur.

In re ALBERT WEBERS, Petitioner in Habeas Corpus;
WILLIAM YOUNG et al., Respondents.

Division One, September 16, 1918.

1. **HABEAS CORPUS: Not of Legislative Creation.** Relief from illegal imprisonment by *habeas corpus* is not the creature of any statute. The writ cannot be abrogated by the Legislature. The Constitution (Art. 2, sec. 26) provides that its privileges shall never be suspended. The Legislature has confined its action principally to facilitating the use of the writ, and the courts cooperate with it in extending these facilities.
2. ———: **Jurisdiction: Appeal.** The Supreme Court has no appellate jurisdiction in a *habeas corpus* proceeding, for an appeal does not lie in such a proceeding.
3. ———: ———: ———: **Constitutional Question.** Whether or not the statute under which a petitioner is imprisoned is constitutional, if he applies to a court of appeals for a writ of *habeas corpus* and that court proceeds to final action, whether by discharging him or remanding him to custody, that case is at an end. If not discharged, but is remanded to custody, his course, if he wishes the Supreme Court to determine the constitutionality of the statute and the consequent validity of his imprisonment under the statute, is to apply to that court for its writ. No way is provided, either by the Constitution or statutes, by which the Supreme Court can acquire jurisdiction in a *habeas corpus* proceeding otherwise than by the use of its own writ, directed to be issued either by itself or by one of its judges.
4. ———: ———: **Transfer from Court of Appeals to Supreme Court: Constitutional Question.** A court of appeals, having issued its

writ of *habeas corpus* on behalf of a prisoner who alleges he is being illegally deprived of his liberty, has no authority, when the constitutionality of the statute under which he is held is properly assailed, to transfer the case to the Supreme Court, on the ground that the constitutionality of said statute is involved. The Supreme Court cannot by transfer acquire jurisdiction in a *habeas corpus* case. [Rule announced in *Moberly v. Lotter*, 266 Mo. 457, criticized.]

Transferred from the St. Louis Court of Appeals.
REMANDED (*without direction*).

C. J. Anderson for petitioner.

Holland, Rutledge & Lashly for respondents and intervenor.

BROWN, C.—This is a proceeding by petitioner for the purpose of obtaining his discharge from the custody of William Young, Chief of Police, and Robert M. Hanna, Captain of Police of the city of St. Louis, by whom he had been arrested in that city on July 17, 1917, upon a charge of having violated an ordinance of said city. The application was made to the St. Louis Court of Appeals. The charging part of the petition is as follows:

“To the Honorable Judges of the St. Louis Court of Appeals in and for the City of St. Louis, Missouri:

“Comes now Albert Webers and respectfully represents to this Honorable Court that he is unlawfully deprived of his liberty by William Young, Chief of Police of the city of St. Louis, Missouri, and Robert M. Hanna, Captain of Police in and for the Third Police District in and for the city of St. Louis, Missouri.

“Your said petitioner further states that he was arrested by a police officer in the city of St. Louis, Missouri, on the twenty-seventh day of July, 1917, and brought by said police officer to a jail known as the Soulard District Police Station, in the said city of St. Louis, Missouri; that the said police officer then and there charged and complained that your petitioner had violated some ordinance of the city of St. Louis, Mis-

souri; that your petitioner has demanded from the person in charge of said police station, a written copy of the charges so made by said police officer against your said petitioner, and that such copy has been refused.

"Your petitioner further states that, after said arrest, your petitioner tendered to the officer in charge of said police station a good and sufficient bond with a good and sufficient surety to insure the appearance of your said petitioner in the City Court No. 1 at such time or times as said cause may be set for hearing; that the said police officer or official whose name is unknown to your petitioner, acting on behalf of the said William Young, Chief of Police, and the said Robert M. Hanna, Captain of Police, as aforesaid, demanded of your petitioner the payment of the sum of fifty cents as a fee for the issuing and accepting of such bond; that your petitioner then and there refused to pay the said sum of fifty cents, or any other amount for the issuing of the said bond, and that your petitioner now remains in the custody of said William Young and said Robert M. Hanna, Chief of Police and Captain as aforesaid, although your said petitioner has tendered and still continues to tender a good and sufficient bond with a good and sufficient surety for his appearance to answer to such charge or any charge which may be placed against him.

"Your petitioner further states that said imprisonment is illegal, in this, to-wit:

"That neither the said Chief of Police, the said Captain of Police, nor any other official or person acting for or on the behalf of the said Chief of Police, the said Captain of Police, nor the said Police Department, had or has any legal right or authority whatsoever to exact such fee of fifty cents, or any other fee for acceptance of such bond."

On August 1, 1917, the respondents filed in the said court identical returns, that of respondent Young being as follows:

"Now comes William Young, Chief of Police of the city of St. Louis, and for his return to the writ of

habeas corpus served upon him on the 27th day of July, 1917, says that he is the duly appointed qualified and acting Chief of Police of the city of St. Louis; that on the 27th day of July, 1917, Albert Webers, petitioner herein, was arrested in the city of St. Louis and taken to the Third District Police Station, charged with having violated an ordinance of the city of St. Louis; that a short time after petitioner's arrival at said station a man, whose name is unknown to respondent, appeared in his behalf and presented a bond in the sum of \$200 for the release of said Albert Webers, but the said Albert Webers, petitioner herein, failed and refused to pay to the officer in charge of said station the sum of fifty cents, as provided for by Section 3459 of the Revised Statutes of Missouri of 1909, as amended by the Session Acts of 1913, page 193, and which provides, in part as follows:

“ ‘Section 3459.—*Fund, how created—police relief association.*—This fund shall be created in the following manner: . . . all percentages of rewards allowed to members of any police force under the regulations of its department, *together with a fee of fifty cents for each and every bond taken by any police officer for the appearance of any person charged with violating any city ordinance, which said officer is authorized then and there to collect:* Provided, however, that no more than one bond fee shall be taken for any arrest, regardless of the number of charges which may be placed against the person arrested, all of which moneys herein designated shall be paid to the treasurer of said relief association.’

“Respondent further states that he was ready and willing to release petitioner herein upon his giving a sufficient bond and complying with the statute above set forth, but that petitioner herein declined to pay over to the officer in charge of said station the sum of fifty cents as provided for by the aforementioned statute, and as a result of his failure to comply with the law petitioner was held in custody at said Third District Police Station until ordered by this Honorable Court

In re Webers.

to produce him before it, which was done on the 27th day of July, 1917.

"Wherefore, respondent, William Young, having made this his return to the writ of *habeas corpus* heretofore issued, and having shown to this court that petitioner herein was not illegally and unlawfully deprived of his liberty, prays that said writ be quashed and that petitioner be remanded to the custody of respondent."

On October 4, 1917, they filed motions to dismiss the petition on the ground that the Court of Appeals had no jurisdiction because the case involved directly the construction of Article 4, Section 53, Clause 26; Article 4, Sections 46 and 47; and Article 10, Section 8, of the Constitution of Missouri; and is brought solely for the purpose of testing the constitutionality of Section 3459, Revised Statutes 1909.

The Court of Appeals being satisfied that the constitutionality of the section of the Revised Statutes of 1909 above referred to was involved in the case, transferred it to this court. The respondents have filed a plea to our jurisdiction on the ground that the Court of Appeals, by reason of the constitutional question involved, had no jurisdiction of the proceeding, and that this court took no jurisdiction by reason of the transfer.

This is a proceeding in *habeas corpus*. It was instituted by petition addressed to the judges of the St. Louis Court of Appeals, and presented to Judge REYNOLDS of that court in vacation, who issued the writ, and, upon its return, transferred the matter to the court, which set a day for the hearing. Upon that day the respondents filed in that court a motion to quash the writ and dismiss the proceeding on the ground that the Court of Appeals was without jurisdiction in the matter, because the proceeding was instituted to test the constitutionality of an act of the Legislature, and involved the construction of certain provisions of the Constitution of the State. The court thereupon transferred the matter to this court. The petition and return

are copied in the statement preceding this opinion, and will be referred to as necessary to a correct understanding of the questions presented. The fact that these questions stand upon the writ indicates the propriety if not the absolute necessity of noticing its nature as an element of their solution.

As has been said, and never questioned, "relief from illegal imprisonment by means of *habeas corpus* is not the creature of any statute, and the origin and history of the writ are lost in antiquity." [12 R. C. L. 1180.] It is truly said by the same author that "while the various purposes for which the writ may be used and the proceedings thereon have been to some extent regulated by ancient English statutes and by local legislative enactments, the writ cannot be abrogated by a Legislature." [Ibid.] It is founded in the broad principle that personal liberty, like life itself, can only be violated subject to the right to appropriate judicial inquiry. Our State Constitution (Sec. 26, Art. 2) recognizes its existence by providing that its privilege shall never be suspended. [Art. 2, sec. 26.]

The Legislature has confined its action principally to facilitating the use of the writ, so that wherever a judicial officer of a court of record may be found, its privilege is available. [R. S. 1909, sec. 2442.] This court has co-operated with the Legislature in extending these facilities. In *State v. Millsaps*, 69 Mo. 359, and later in *State v. Wilson*, 265 Mo. 1, it held that the judge of the probate court, a court of limited constitutional jurisdiction (Art. 6, sec. 24, Mo. Constitution), had jurisdiction in *habeas corpus* under the section of our statute above cited, and it follows that *the judges* of this court and of the courts of appeals have the same authority, derived from the same legislative source. [Lowe v. Summers, 69 Mo. App. 637.] Having obtained jurisdiction by the presentation of the petition and the issue of the writ, he may proceed to the determination of the right, regardless of the constitutional jurisdiction of his court, or the nature of the questions

of law or fact involved. The power of the Legislature to regulate the use of this extraordinary remedy is as broad as is the beneficent purpose for which it exists. Its only confines are found in the limitations imposed by the organic law.

We have stated these principles at some length because they constitute the foundation upon which our jurisdiction rests. The writ is the most highly remedial of all that we have inherited through generations of a liberty-loving people, and all constitutional and statutory provisions intended to give it effect must be read and judged in the light of its purpose.

The jurisdiction of this court, except in cases otherwise directed by the Constitution, is appellate only. Its appellate jurisdiction has no reference to *habeas corpus*, in which there lies no appeal. There is no way provided either by constitution or statute in which it can acquire jurisdiction in such a proceeding otherwise than the use of the writ by itself or one of its judges. The authority of the judge to issue and hear it is limited, as we have already noted, to the vacation of the court, and it follows that upon its meeting it is returned into the court, as was done in the instant case with the writ of Judge REYNOLDS of the Court of Appeals. Had the Court of Appeals proceeded to final action in this case whether by discharging the petitioner or remanding him to *custody*, it would have been at an end. No appeal or writ of error or other proceeding could have given this court jurisdiction of *that case*.

There is another branch of the constitutional jurisdiction of the Supreme Court which occurs to us in this particular connection. It has "superintending control over the courts of appeals by mandamus, prohibition and *certiorari*." In other words, it may compel them to proceed to exercise their jurisdiction, to prevent them from exceeding that jurisdiction, and to ascertain whether they are within their jurisdiction. We have confined the last definition to the ancient office of the writ of *certiorari*, because of the careful withholding

of all appellate jurisdiction under whatever name it may be exercised. The Constitution permits and requires (Amendment of 1884, Section 6) that certain cases be certified to this court, but there is nothing in the provision that affects this case. It also authorizes (Id. sec. 3) the Legislature to provide for the transfer of cases from a court of appeals to the Supreme Court, and in pursuance of this authority Section 3938 was enacted, providing that "in the event of any case being sent improperly on appeal or writ of error from a lower court to either of the courts of appeal when the same should have been sent to the Supreme Court" it shall be transferred to the Supreme Court. We note with what care the Legislature has limited this provision to cases sent to the courts of appeal *on appeal or writ of error*, and withholds the power to transfer in any other cases. It has no application whatever to writs of *habeas corpus* sued out under the Habeas Corpus Act upon petition either to the Court of Appeals or to one of its judges.

We have carefully examined all the constitutional and statutory provisions to which our attention has been called, and some to which it has not, and they have all tended to strengthen our impression of the care which they exhibit to avoid any expression of an intention on the part of the people, speaking either through organic law or through legislation, to the effect that a proceeding of this character may be brought into this court by transfer from the Court of Appeals. It is unnecessary to consider in this connection our judgment in *Moberly v. Lotter*, 266 Mo. 457, in which a judgment of the Macon Circuit Court involving the title to land was brought on writ of error to the Kansas City Court of Appeals and transferred by that court to the Supreme Court. Our judgment was founded upon the reasonable theory that the writ of error performed an appellate office in a cause of which this court had appellate jurisdiction. The same principle applies to the case of *State v. Nortoni*, 201 Mo. 1, which was prohibition from

this court directed to the St. Louis Court of Appeals to prohibit it from proceeding by a similar writ to prevent the St. Louis Circuit Court from proceeding to adjudicate a cause appealable to this court. This class of cases have little relation to the question now before us. No appellate jurisdiction exists in *habeas corpus*. The act creates an emergency jurisdiction to facilitate the remedy through judicial agencies such as may be found convenient to petitioner. Had there been, in this case, no superior judge or court present in St. Louis, he could have resorted to the probate court in that city, which would then have had plenary jurisdiction, constitutional and otherwise, relating to his right. From its decision there would be no appeal, but should it refuse to grant the relief he might turn to a superior court or judge for another hearing.

This is in perfect harmony with the purpose of the act, which is intended to provide protection alike for the rich and poor. Under its terms, the person detained in a distant county could only resort to the high constitutional jurisdiction of this court by paying the traveling expenses, not only of himself but of his custodian, to the state capital, and he is compensated in some measure for this hardship by the permission to resort to any of the appropriate judicial agencies of the locality in which he may be wrongfully detained. It is our duty, whenever our authority is properly invoked, to serve the constitutional and legislative purpose, but this cannot be done in the exercise of our appellate jurisdiction.

It follows from the foregoing suggestions that, in our opinion, we have acquired no jurisdiction in this proceeding. It is true that in the Nelson case (251 Mo. 63), we accepted, *sub silentio*, jurisdiction in a similar case. No such question was raised, and it is indicated by a careful perusal of the record that this action was silently desired by all parties. We do not think it safe to give permanent effect to a practice so established. The important constitutional rights and principles involved in this case deserve at least some inquiry before

becoming incorporated into our jurisprudence. For that reason we make no suggestion with reference to the important question involved in the merits of the proceeding.

The record is remanded to the St. Louis Court of Appeals without direction. *Railey, C.*, concurs.

In the foregoing opinion of *BROWN, C.*, *Blair, J.*, concurs.

BLAIR, P. J. (concurring).—The Constitution (Sec. 12, Art. 6,) empowers the Court of Appeals to issue writs of *habeas corpus*. Section 5, Amendment of 1884 to Article 6, applies to appeals and writs of error only. The restrictions imposed by the sections mentioned do not apply in this case.

GRAVES, J. (concurring).—The code as to *habeas corpus* is a code unto itself. The applicant for this beneficial writ can go to as many courts as he can find, provided he takes them in gradation of authority. In other words, he can go from the lowest to the highest, commencing, of course, with the lowest. He does not go by an appeal, but by original right, and as an original case. Under this code the petitioner herein had a right to go to the St. Louis Court of Appeals, because by law such court has been given jurisdiction in such cases. If for any reason that court remanded him under the writ, he still had the right to come here, but this right was one by original application to this court, and not by certification from the Court of Appeals. There is no authority in law to certify in such cases. I concur thus separately because the opinion recognizes the rule in *Moberly v. Lotter*, 266 Mo. 457, and in that rule I do not concur, and will not concur until after this court again so says in a case wherein the same question is one at issue. The question there is not the question here, and there is, therefore, no call to approve the doctrine of the *Moberly-Lotter* case.

For this reason I concur in the result and in much of what is said in the opinion. *Bond, P. J.*, and *Woodson, J.*, concur in these views.

C. O. WHITE v. L. W. HERMINGHAUSEN et al.,
Appellants.

Division One, September 16, 1918.

1. **SURVEY: Arbiters: Separate Report: Umpire.** A stipulation between two adjoining claimants to a parcel of land that the dividing line between their respective tracts should be ascertained by two surveyors, one to be chosen by each, and that if they could not agree a third, named in the stipulation, "shall decide all matters of difference between said two surveyors," did not require that the three should act together and join in one report, but the third could accept the parts of the line agreed upon by the two and proceed to survey the part not agreed upon by them, and file a separate report setting forth his finding. The stipulation did not require that there be one report concurred in by a majority, nor did it require that the third act jointly with the other two.
2. ———: ———: ———: **Understanding of Parties.** Where there is any ambiguity as to the meaning of a stipulation, what the parties did under it, without objection, with the full knowledge of each other, indicates its meaning.

Appeal from Chariton Circuit Court.— *Hon. Fred Lamb,*
Judge.

AFFIRMED.

O. C. Herminghausen and *S. J. & G. C. Jones* for appellant.

(1) The surveyors having failed to establish the line in the form and manner provided in the stipulation, namely, by making a survey in accordance with the government field notes, their report is void, of no effect, is not binding, and should have been rejected by the court. *Squires v. Anderson*, 54 Mo. 193; *Ellison v. Weather*, 78 Mo. 124; *Lorey v. Lorey*, 60 Mo. App. 420; *Coffin v. German Fire Ins. Co.*, 42 Mo. App. 295; 3 Cyc. 674, 675. (2) The reports of the surveyors, being separate, individual and independent of each other,

and no survey being concurred in by a majority of the surveyors acting under the stipulation, rendered their proceedings of no effect. Besides, the surveyors must act together—that is, as a body. When the two selected by the parties failed to agree, and which failure necessitated Jacoby acting as a third, he could not act independently of the others. He could only act jointly with the others. 3 Cyc. 653, 655, 666.

J. A. Collet for respondent.

(1) The law favors adjustments of controversies and discourages litigation, and the proceedings of the arbitrators will be liberally construed and their award upheld if it can be done without doing violence to the submission. 3 Cyc. 673. (2) Appellant will be held to the observance of the terms of the stipulations signed by him. *Dowling v. Wheeler*, 117 Mo. App. 169; *Stone v. Trust Co.*, 183 Mo. App. 261. (3) Jacoby was not acting as a member of the board of arbitrators, but was an umpire chosen only to act in case of disagreement between members of the board of arbitrators, and it was proper for him to act alone as such umpire, and he had full authority in making his finding to decide all questions involved in the submission. 3 Cyc. 663; *Home Insurance Co. v. M. Schiff's Sons*, 103 Md. 164; *Hartford Fire Ins. Co. v. Bonner Merc. Co.*, 56 Fed. 378; *Lyon v. Blossom*, 11 N. Y. Sup. Ct. 318; *Tyler v. Webb*, 49 Ky. 123; *Havan v. Winnisimmet Co.*, 93 Mass. 377; *Ingraham v. Whitmore*, 75 Ill. 24.

WOODSON, J.—This is a suit in ejectment, brought by the plaintiff in the circuit court of Chariton County, to recover a strip of land off the east side of the north-east quarter of Section Four, Township Fifty-five, Range Twenty, in said county, containing some twelve or thirteen acres.

The plaintiff recovered a judgment for the possession of the land in the circuit court, and after taking the proper preliminary steps, the defendants duly appealed the cause to this court.

The controversy grows out of the location of the dividing line between the parties' farms. Prior to the institution of this suit repeated efforts were made by the parties to agree upon a dividing line, all of which came to naught, and thereupon this suit was instituted. While this suit was pending the parties again attempted to settle their differences and in pursuance thereto, on September 19, 1914, entered into the following written stipulation:

"It is hereby stipulated and agreed by and between the parties to the above entitled cause that said cause shall be compromised and dismissed upon the following terms and conditions, to-wit:

"First: It is agreed that the true line between the Northwest Quarter of Section Three, Township Fifty-five, North, Range Twenty, West, in Chariton County, Missouri, the property of C. O. White, and the North East Quarter of Section Four, Township Fifty-five, North, Range Twenty, West, in Chariton County, Missouri, the property of O. C. Herminghausen, shall be ascertained and determined by a legal survey to be made by two competent surveyors, one of whom shall be selected by plaintiff and the other by defendants, and in the event that the two surveyors thus chosen should fail to agree, then, the parties hereto agree upon C. E. Jacoby as the third surveyor, who shall decide all matters of difference between said two surveyors chosen by the parties hereto, and the line considered as the true line between the lands of plaintiff and defendants, and the parties to this suit agree to stand to and abide by such survey. However, in making such survey, the same is to be made from the United States field notes.

"Second: Both parties to this suit shall be notified of the time when said survey shall be made and shall have the opportunity to be present during said survey in person or by representative.

"Third: Said surveyors shall make and return to this court their report, showing the location of said line so made by them, and if said line does not coincide

with the line as now marked by the fence between the aforesaid Northeast Quarter of Section Four and the Northwest Quarter of Section Three, they shall, by proper description, show the lands embraced between the true line so found by them and the line as now marked by said fence, and judgment shall be entered by this court in accordance with said report and shall be accepted by the parties hereto as a final judgment.

"Fourth: It is hereby further stipulated and agreed that this cause shall be transferred to the circuit court of Chariton County, Missouri, at Keytesville, and stand for final disposition at the November, 1914, term of said court at Keytesville.

"Fifth: It is further stipulated and agreed that the costs of making said survey, together with all court costs which have heretofore accrued in this suit, shall be divided and paid equally by the parties hereto.

"Signed in duplicate this 19th day of September, 1914."

Under the terms of this stipulation, plaintiff elected A. F. Arrington, a civil engineer of Chariton County, Missouri, and defendants M. E. Bannon, a civil engineer of Fort Madison, Iowa, to make a survey of the land in dispute between the parties.

In pursuance to the terms of said stipulation the parties to the same and the said engineers agreed upon met on the premises and proceeded to make the survey of the line and land in controversy. Arrington and Bannon, having failed to agree upon the dividing line, each of them as provided for by said stipulation made out and filed in said case their separate report, which are quite lengthy, showing the points wherein they agreed and disagreed; and thereupon said engineers, in compliance with the terms of said stipulation, called in C. E. Jacoby as the third engineer to decide the differences between them. After the latter had been called, the two reports of Arrington and Bannon were submitted to him and he was requested to proceed with the performance of the duties imposed upon him by the stipulation.

When these stipulations were submitted to him, Jacoby was uncertain as to his duties and how he should proceed to discharge them. That is, he was uncertain whether he should get the board together and make a re-survey of the whole thing or whether he, acting by himself and as umpire in the matter, should decide the questions not agreed upon by the other two surveyors. With these questions in his mind he took the matter up with both parties to the suit and also with the court, and after consultation between the counsel representing both parties and the court, without dissent or disagreement Mr. Jacoby was advised that under the terms of the stipulation he should treat as fixed and settled all points on which the two surveyors, composing the board, had agreed, and should proceed to a settlement of all questions in dispute between said surveyors.

In view of the foregoing instructions, Mr. Jacoby proceeded to and did resurvey the disputed line, accepting as correct the portions of the surveys agreed upon by Arrington and Bannon, and made his own survey of the remainder of the line, the part as to which they disagreed. In pursuance to this survey Mr. Jacoby made out his written report to the court, and filed the same in the case. This report covers ten pages of printed matter, besides two elaborate plats attached showing in detail the survey made by him. I omitted to state that the report of Mr. Bannon also had attached to it an equally elaborate plat showing the survey he made of the premises.

Jacoby, by his said report, found that the plaintiff was entitled to recover from the defendants, the following real estate, to-wit:

“Beginning at the corner common to Sections Three and Four of the Township line between Township Fifty-five and Fifty-six, Range Twenty, Chariton County, Missouri, thence running southerly in a straight line 2729.8 feet to the east quarter section corner of Section four, Township Fifty-five, Range Twenty, thence easterly a distance of 125 feet, to a point on the line of the present fence, marking the line between the Northeast

White v. Herminghausen.

Quarter of Section Four and the Northwest Quarter of Section Three, thence northerly along the line of the present fence 2729.8 feet, more or less, to the Township line between Townships Fifty-five and Fifty-six, Range Twenty, thence west along said Township line 251.1 feet, to the point of beginning, containing in all 11.78 acres, more or less."

In view of the position taken by defendants after the reports of Arrington and Bannon were filed, it is important to state that the record shows that during the time Arrington and Bannon were making the survey provided for by the stipulation, appellant was at all times present actively participating in what was being done, and at no time did he object to the course that was being pursued by these surveyors or the means and methods employed by them in the making of this survey.

After the report of Jacoby was filed in the case, the defendants filed their objections thereto covering seven printed pages.

I mention the great length of the reports of the surveys, elaborate plats accompanying them, and the length of the objections thereto, for the purpose of showing why they are not set out in this statement of the case.

At the hearing of the objections to the reports much evidence was introduced, the material portions of which will be noted during the course of the opinion.

After hearing the evidence, the court found the issues for the plaintiff and rendered judgment for him for the possession of the land before mentioned in the report of Jacoby.

Therefore, as previously stated, defendants duly appealed the cause to this court.

I. Counsel for defendants insist (quoting), that "the surveys having failed to establish the line in the

Survey. form and manner provided in the stipulations,

namely, by making a survey in accordance with the Government field notes, their report is void, of no

effect, is not binding, and should have been rejected by the court."

If this instance was supported by the facts of the case, it would be well taken, but unfortunately for the defendants the report on pages 9, 10, 11, and 12 of the abstract of the record shows with much particularity the manner and form in which the Government surveys were followed in running the true line between the two farms of the parties to this suit. If there was any particular deviation from Government field notes it has not been called to our attention and for that reason we assume there was no material departure therefrom.

This insistence is ruled against the defendants.

II. It is next insisted by counsel for defendants that the judgment of the trial court should be reversed for the reason stated:

"The reports of the surveyors, being separate, individual and independent of each other, and no survey being concurred in by a majority of the surveyors acting under the stipulation, rendered their proceedings of no effect. Besides, the surveyors must act together—that is, as a body. When the two selected by the parties failed to agree, and which failure necessitated Jacoby acting as a third, he, Jacoby, could not act independently of the others. He could only act jointly with the others."

Separate
Reports.

In support of this insistence we are cited to the 3 Cyc. 653, 655 and 666.

Conceding the corrections of the abstract legal proposition presented by this insistence, yet it has no application to this case, for the reason that the stipulation of the parties provides to the contrary. Its language is: "In the event that the two surveyors thus chosen [Arrington and Bannon] should fail to agree, then the parties hereto agree upon C. E. Jacoby as the third surveyor, who shall decide all matters of differences between said two surveyors chosen by the parties hereto," etc.

Those surveys show that Arrington and Bannon agreed upon certain parts of the survey and disagreed as to all others; and the record shows that the survey or Jacoby accepted the parts agreed upon by them, and proceeded to survey the remainder of the line not agreed upon by the two surveyors mentioned. This was in strict compliance with the provisions of the stipulation mentioned. Arrington and Bannon did not select Jacoby; he was chosen by the plaintiff and defendants and named in the stipulation as the engineer who should finally dispose of the differences that might arise, if any, between the former two. The parties to the suit had the same legal right to select Jacoby to decide the differences that might arise between Arrington and Bannon, as they did to select the latter two in the first instance, and having done so his decision is binding and conclusive in the case. Moreover, the record shows that the plaintiff and defendants so understood the stipulation, for they were both present and participated in every thing that was done by all of the surveyors, and made no complaint whatever, thereby signifying their acquiescence in what they were doing. Had there been any ambiguity as to the meaning of the stipulation regarding this matter, then what the parties did thereunder, without objection, would have clearly shown their understanding of the same, as was said by Norton, C. J., in *Scott v. Scott*, 95 Mo. 300, l. c. 318. "It has been said by an eminent chancellor: 'Tell me what the parties have done under a deed, and I will tell you what the deed means;' and in *Patterson v. Camden*, 25 Mo. l. c. 22, it is said: 'I know of no better mode of ascertaining the meaning of a writing than is shown if all the parties acted on a particular meaning.'"

The rule announced in those cases is particularly applicable to the case at bar, and is controlling herein.

We rule this insistence against the defendants.

III. Counsel for defendants present the last proposition decided in different language, in three other

State ex rel. Dunklin County v. Blakemore.

separate paragraphs of their briefs. What we have ruled above is controlling upon these three propositions also.

Finding no error in the record, the judgment of the circuit court is affirmed. All concur.

THE STATE ex rel. DUNKLIN COUNTY v. O. C.
BLAKEMORE et al., Appellants.

Division One, September 16, 1918.

1. **JUDGMENT: Entirety.** There can be but one final judgment and it must dispose of all parties; but the common-law rule that judgments are entireties is effective only in exceptional cases.
2. ———: ———: **Suit on Bond: Corrected as to Non-Liable Defendants.** Suit was brought by the county against a defaulting treasurer and his bondsmen. Two of the defendants, sued as heirs of a deceased surety, proved that said surety died before suit was brought on the bond, that his estate had been finally settled in the probate court before the trial of the case and that no claim against the estate was made by the State or county, and they asked the court to direct a verdict in their favor, which request was refused. After verdict they moved for a new trial, whereupon the court set the verdict aside as to them, and rendered judgment in their favor and against the other defendants. *Held*, that the county might have sued any or all of the sureties, since their liability was both joint and several, and judgment against those shown to be liable was proper, and it being conceded that said heirs were not liable the judgment is not to be reversed because the trial court sustained their motion for a new trial.
3. **BOND: County Treasurer: Drainage District Funds: Common Law Liability.** The bond of a county treasurer, whose terms clearly include all county funds except school funds, the statute clearly requiring him to give bond for all moneys that shall from time to time come into his hands from any drainage district in the county, covers drainage district funds; and if not good as a statutory bond, because not conditioned exactly as prescribed by the statutes, is nevertheless good as a common-law bond, and covers drainage funds of districts organized after it was executed.
4. ———: ———: **Interest.** By force of the statute (Sec. 3771, R. S. 1909) the county treasurer and his sureties are liable for interest

on all moneys belonging to the county appropriated by him, from the day he went out of office, at least, and not simply from the time suit was brought.

5. ———: ———: **Application of Payments.** Where the county treasurer did not deposit the funds in his hands separately, but mingled them all in depositing them, the trial court did not err in instructing the jury, in a suit on his bond, that if he was indebted to the county and paid it a less sum than the total due and made no application of the payment to particular funds, the county had the right to apply the payment as it deemed best, and the bringing of the suit upon the bond "is evidence which will authorize you to find there was an application of the payment to his indebtedness, if any, to all funds other than those covered by the bond sued on," no question having been raised by the sureties at the trial as to whether the county court ordered the suit brought. If the treasurer failed to direct the application of the fund, the county had the right to do so; and the bringing of the suit on the bond for the whole deficiency would have bound the county, as an application of payment, in any other proceeding, and was substantial evidence of the county's intention to make the application to the funds mentioned in the instruction.
6. ———: ———: **Commingleing of Funds; Estoppel.** In a suit on a county treasurer's bond it was not error to instruct the jury that if he failed to pay over a balance he owed, and if he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, "then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on," although estoppel was not pleaded, there being ample evidence of the facts predicated in the instruction. Whatever estops the principal usually estops the surety; and where he testified that he had mingled the funds and if there was any shortage it was impossible for him to tell where it was, neither he nor his sureties can profit by his wrong.
7. ———: ———: **Good Character.** Evidence of a county treasurer's good character is not admissible in a suit on his bond to recover the amount of county funds appropriated to his own use.
8. **EVIDENCE: Specific Objection.** Appellants cannot be heard to contend that certain evidence offered by them for a specific purpose and rejected was competent for other purposes.

Appeal from Dunklin Circuit Court.—*Hon. Frank Kelly,*
Judge.

AFFIRMED.

Fort & Zimmerman, Ely, Pankey & Ely and Jones & Jones for appellants.

(1) The court erred in overruling appellants' separate motion for new trial and appellants' separate motion in arrest of judgment, after sustaining separate motion for new trial and separate motion in arrest of judgment of appellant's co-defendants, Langdon Jones and Byron Jones, as there can only be one final judgment in a cause disposing of all parties. Sec. 2079, R. S. 1909; Crow v. Crow, 124 Mo. App. 125; Miller v. Bryden, 34 Mo. App. 608; Eichelmann v. Weiss, 7 Mo. App. 89; Holborn v. Naughton, 60 Mo. App. 105; Bremen Bank v. Umrath, 55 Mo. App. 49; State ex rel. v. Canterbury, 124 Mo. App. 246; Hughey v. Eyssell, 167 Mo. App. 564; State ex rel. v. C. & A. Railroad, 265 Mo. 716; Star Bottling Co. v. Exposition Co., 240 Mo. 639; Mann v. Doerr, 222 Mo. 10; 23 Cyc. 816; Mahoon v. Colment, 51 Miss. 60; Crews v. Lackman, 67 Mo. 619. (2) The court erred in giving plaintiff's instruction (a) because it authorized a recovery on the bond sued on for a shortage in drainage district funds which are not covered by the bond sued on. Sec. 5605, R. S. 1909; State ex rel. Maries Co. v. Johnson, 55 Mo. 82; City of Harrisonville v. Porter, 76 Mo. 360; State ex rel. Martin v. Harbridge, 43 Mo. App. 18. (b) Because said instruction authorized a recovery of interest from January 29, 1909, when there was no evidence of a demand made on the sureties prior to the institution of this suit on April 15, 1911. McDonald v. Loewen, 145 Mo. App. 59; Burgess v. Cave, 52 Mo. 45; Benton v. Craig, 2 Mo. 198; 5 Cyc. 767. (3) There was no evidence of any order made by the county court for the institution of this suit and no evidence that the funds other than those covered by the bond sued on received the money actually turned over by Blakemore to his successor, or that the funds covered by the bond sued on suffered the loss of the shortage. Sec. 3781, R. S. 1909; State ex rel. v. Forrest, 177 Mo. App. 251; Blades v. Hawkins, 133 Mo. App. 337; Sanderson v. Pike County,

State ex rel. Dunklin County v. Blakemore.

195 Mo. 604; *Manpin v. Franklin County*, 67 Mo. 329; *Dennison v. St. Louis County*, 33 Mo. 171; *Barnett v. Kemp*, 258 Mo. 159. Said instruction assumed a fact not proven, to-wit, that the county had authorized the bringing of this suit; and was in effect, directing a verdict for plaintiff and was a comment on the evidence. *Sanderson v. Pike County*, 195 Mo. 605; *State ex rel. v. Morrison*, 244 Mo. 211; *Scheurer v. Rubber Co.*, 227 Mo. 357; *Muncey v. Bevier*, 124 Mo. App. 15; *Crow v. Railroad*, 212 Mo. 610; *Barnett v. Kemp*, 258 Mo. 159; *Richardson v. Richardson*, 166 Mo. App. 164. The doctrine of application of payments does not apply where the party attempting to invoke the doctrine is only acting in a fiduciary capacity for the benefit of others and does not own the several outstanding accounts in his own right. *In re Switzer*, 201 Mo. 88; *State ex rel. v. Elliott*, 157 Mo. 617; *State ex rel. v. Branch*, 151 Mo. 637. The responsibility of these sureties arises from their bond; not from what the county court might have done or not have done. *Todd v. Boone County*, 8 Mo. 437; *Draffen v. City of Boonville*, 8 Mo. 395. Application must be made before suit brought. *Shortridge v. Pardee*, 2 Mo. App. 366; *Ponlun v. Collier*, 18 Mo. App. 607; *United States v. Kirkpatrick*, 9 Wheat (U. S.), 724; *Johnson v. Thomas*, 77 Ala. 369; *Lazarus v. Freidheim*, 51 Ark. 378; *Fairchild v. Holly*, 10 Conn. 184; *Applegate v. Koons*, 74 Ind. 248; *Robinson v. Doolittle*, 12 Vt. 249. (4) - No estoppel against defendants was pleaded, and there was no evidence introduced warranting the invocation of the doctrine of estoppel. *Osborn v. Court of Honor*, 152 Mo. App. 661; *Loving Co. v. Hesperian Cattle Co.*, 176 Mo. 352; *Chance v. Jennings*, 159 Mo. 558; *Throckmorton v. Pence*, 121 Mo. 60; *Blodgett v. Perry*, 97 Mo. 273; *Barnett v. Kemp*, 258 Mo. 158. (5) The court erred in excluding testimony offered by defendants of the previous good reputation for honesty and fair dealing of O. C. Blakemore. *State v. Wilcox*, 179 S. W. 479.

George Smith, Jas. A. Bradley, J. P. Tribble, C. M. Edwards and Lee B. Ewing for respondent.

There is no merit in appellants' attack on the judgment. There was a judgment against appellants for the amount of the jury's verdict. As to Langdon Jones and Byron Jones, the court sustained their motion for a new trial, then sustained their demurrer and rendered judgment in their favor against plaintiff. The rights of all the parties to the litigation were settled by the decree. It was final. Sec. 2090, R. S. 1909; Rock Island Implm't. Co. v. Trust Co., 168 Mo. 256; Leslie v. Rhea, 9 Mo. 172; Rogers v. Gasnell, 51 Mo. 466. Even if the judgment were erroneous as to Langdon Jones and Byron Jones, it was not void, and this court would be authorized to correct the error and enter final judgment here. State ex rel. v. Tate, 109 Mo. 265; Carpenter v. St. Joseph, 263 Mo. 712; Patterson v. Yancey, 97 Mo. App. 698. (1) This obligation of the bond was broad enough to, and did, include the receiving and disbursement of drainage district funds. It was a part of the duties of the county treasurer, as such treasurer, to receive and disburse the drainage funds. R. S. 1909, secs. 5599, 5603, 5604, 5622, 5634; Beer v. Wolf, 116 Mo. 184; State ex rel. v. Tittman, 134 Mo. 171; State v. Curtis, 67 Mo. App. 431; Martin v. Whiter, 128 Mo. App. 125; Calhoun v. Gray, 150 Mo. App. 600; Murphy v. Carlin, 113 Mo. 120; Good v. St. Louis, 113 Mo. 270; Webb v. Insurance Co., 134 Mo. App. 580; State v. Sappington, 68 Mo. 454. (2) Interest was recoverable upon the shortage of Blakemore at least from the time he went out of office, January 29, 1909. The law imposed the duty on him and his sureties to make settlement at that time. The bond in suit is their written contract to do this. No demand was necessary to be made upon the sureties in order to entitle the respondent to recover interest. Interest was recoverable from date of conversion. Sec. 3771, R. S. 1909; Sec. 7179, R. S. 1909; Clark County v. Hagman, 142 Mo. 430; State ex rel. v. Sandusky, 47 Mo. 381; McPhillips v. McGrath, 117 Ala.

549; 22 Cyc. 1543, 1544, 1551; *Hazlett v. Holt County*, 51 Neb. 716. (3) In the absence of any directions from Blakemore as to the particular funds to be credited with his payment to his successor, the county had the right to make the application to the payment and the discharge of his indebtedness, to any fund it saw fit. There was no evidence in this case that of the particular money paid over by Blakemore enough did not belong to the school fund to discharge his obligations to that fund. *State v. Smith*, 26 Mo. 266; 37 Cyc. 1221; *Pratt's Appeal*, 41 Conn. 191; *Speck v. Comm.*, 3 Watts (Pa.), 324; *Sandwich v. Fish*, 2 Gray (Mass.), 298; *Grafton v. Reed*, 34 W. Va. 72; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592. (4) The bringing of this suit on the particular bond was an election by the county to apply the payment made in January, 1909, to the discharge of his indebtedness on all other bonds. *Haynes v. Waite*, 14 Cal. 446; *Starrell v. Barber*, 20 Me. 457; *Bobs v. Stickney*, 36 Ala. 482; *Mayor of Alexandria v. Patten*, 4 Cranch. 317. (5) In the court below, no question was raised that this suit was not instituted and prosecuted by Dunklin County, by its duly constituted and qualified officers. Nor was any question raised by appellants as to the county's right to bring this suit. Therefore, appellants will not be heard to assert any such contention here. *State ex rel. v. Sappington*, 68 Mo. 456; *Walker v. Owen*, 79 Mo. 567; *Mechanic's Bank v. Gilpin*, 105 Mo. 21. (6) The criticism that no estoppel was raised by the pleadings is without merit. It is only necessary to plead an estoppel when it is the basis of the suit. A party is never deprived of the benefit of an estoppel where it could not be pleaded, or where it arises out of a matter which is not the foundation of the suit. *Long v. Lackawana Coal Co.*, 233 Mo. 738; *Tyler v. Hall*, 106 Mo. 313; *Thomas v. Smith*, 51 Mo. App. 610; *Covell v. Western Union Tel. Co.*, 164 Mo. App. 630; *Saginaw Coal Co. v. Connelly*, 146 Mich. 395; *Hayes v. Va. Mut. Protective Assn.*, 76 Va. 225. (7) Even if it was necessary to plead an estoppel, still if evidence tending to establish the estoppel is admitted without

objection, necessity of pleading it is waived. *Capital Lumber Co. v. Barth*, 81 Pac. 995; *Davis v. Davis*, 26 Cal. 23; *Weinstein v. National Bank*, 69 Tex. 38; *Hanson v. Buckner*, 4 Dana (Ky.), 255; *Standard Sanitary Co. v. Arrott*, 135 Fed. 756. (8) By mingling moneys arising from funds covered by different bonds, and keeping all in one common account, so that it was impossible to tell to what fund the money abstracted by him belonged, Blakemore committed a wrong, and he and his sureties are estopped to take advantage of same. *Broom's Legal Maxims* (8 Ed.), 234, 235; *Argill v. Sarpy*, 1 Mo. 720; *Frank v. Caruthers*, 108 Mo. 569; *Western Construction Co. v. Stone Co.*, 80 N. E. 856; *Taylor v. State to Use*, 11 L. R. A. 852; *N. Y. Mutual Ins. Co. v. Armstrong*, 117 U. S. 591; *Van Kirk v. Addler*, 111 Ala. 104. (9) An act of the principal which estops him to set up a defense personal to himself estops the sureties on his bond from setting up the defense. *Henry County v. Salmon*, 201 Mo. 167; *McCabs v. Rainey*, 32 Ind. 309; *Pattersons' Appeal*, 48 Penn. St. 345; *Boone County v. Jones*, 12 N. W. (Ia.) 995; *Seaver v. Young*, 145 Ill. 253, 48 Ill. App. 419.

BLAIR, P. J.—This is an appeal from a judgment in a suit against the treasurer of Dunklin County and the sureties on his bond. The treasurer's books show a shortage of more than \$14,000. Over \$6000 of this occurred during his first term. He was re-elected in 1906, and went out of office January 29, 1909. The verdict was for the shortage during his second term and interest from the date he went out of office. Three defendants were sued as the heirs of a deceased surety. One of these was not served. The other two proved their ancestor died before suit was brought and that his estate had been finally settled in the probate court before the trial of the case. No claim against the estate was made by the State or county. These defendants, Jones by name, asked the court to direct a verdict in their favor. This was refused. After verdict against all defendants, they moved for a new trial. The court

set aside the verdict as to defendants Jones, and then rendered judgment in their favor and against the other defendants. Other facts are stated in connection with the discussion of questions to which they are relevant.

I. It is argued the judgment must be reversed because the court sustained the motion of Langdon and Byron Jones for a new trial. Counsel are correct in the view that there can be but one final judgment. ment and it must dispose of all parties.

[Sec. 2097, R. S. 1909; Connelly v. Railroad, 169 Mo. App. 1. c. 281.] The final judgment in this case does not offend this rule. Every party has judgment either for or against him. It is not contended the judgment in favor of Langdon and Byron Jones proceeded upon any erroneous view of their rights on the merits of their defense. The defense which was sustained applied to no other defendant. It was made out by record proof or its equivalent. It is settled that if judgment had gone against these and they had appealed, this court, in case their non-liability appeared as a matter of law, must have reversed the judgment as to them regardless of the fate of the appeal of the rest. [Carpenter v. St. Joseph, 263 Mo. 1. c. 712.] In many cases this court affirms as to some appellants and reverses as to others. The common-law rule that judgments are entireties is effective only in exceptional cases. [State ex rel. v. Tate, 109 Mo. 1. c. 270 et seq.; Patterson v. Yancey, 97 Mo. App. 1. c. 698.] In this case the liability was joint and several. [Sec. 2769, R. S. 1909.] Respondent might have sued all or any of those it did sue. [Sec. 2772, R. S. 1909; State ex rel. v. Hoshaw, 86 Mo. 193.] Having sued all, judgment against those shown to be liable was proper. [Bagnell v. Railway, 242 Mo. 1. c. 20; Crews v. Lackland, 67 Mo. 1. c. 621.] Cases are cited in which all defendants were liable or none was so. These decisions are inapplicable. The case of Hughey v. Eyssell, 167 Mo. App. 564, is peculiar. The action was against two defendants. The

State ex rel. Dunklin County v. Blakemore.

trial court directed a verdict in favor of one of these. The jury ignored the direction and found generally for plaintiff. The trial court rendered judgment against one only and in favor of the one for whom it had attempted to direct a verdict. It was held defendants were jointly liable and subject to contribution, and the appealing defendant had "a right to have the question determined whether" the other was "to bear any share of the burden." One judge dissented. In the case at bar this question was not presented to the trial court by any of the motions. It is unnecessary to discuss the soundness of the rule applied in the Eyssell case.

In the circumstances it cannot be held there is in this case any reversible error presented by this contention of appellants.

II. It is insisted the bond does not cover drainage district funds. The condition of the bond is that if Blakemore "shall faithfully discharge the duties of said office of treasurer of said county according to the laws of the State of Missouri in receiving, handling and disbursements of all funds, except school funds of said county, school township and school district funds then this obligation to be void, otherwise," etc.

**Treasurer's
Bond:
Drainage
District
Funds.**

Section 3752, Revised Statutes 1909, requires the county treasurer to give bond "conditioned for the faithful performance of the duties of his office." Section 5605, Revised Statutes 1909, requires him to "enter into a separate bond for each drainage district organized in the county . . . conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come" into his hands.

The bond in suit is not conditioned exactly as prescribed by either of these statutes. Nevertheless, its terms plainly include all county funds except school funds. The obligation to give bond for all these moneys is clear. If not good as a statutory bond, it is good as

a common-law bond. It contravenes no public policy, violates no statute, was voluntarily given, and secures, by its terms, moral and legal obligations of the treasurer. The statute provides no form and does not purport to nullify bonds conditioned otherwise than as prescribed. It is good to the full extent of its conditions. [State ex rel. v. O'Gorman, 75 Mo. l. c. 378, 379; State ex rel. v. Sappington, 67 Mo. l. c. 533; State ex rel. v. Horn, 94 Mo. l. c. 165; Barnes v. Webster, 16 Mo. l. c. 265.]

In the cases relied on by appellant it was held that a bond given in one capacity could not be resorted to in case the official defaulted in a distinct capacity.

It is suggested the bond could not cover drainage funds of districts organized after the bond was executed. We think this bond is to be held to have been given in contemplation of whatever the law authorized to be done. Among these things was the organization of drainage districts, of the funds of which the treasurer would become custodian by force of the existing statute.

III. It is conceded the verdict is for the amount of the shortage during 1907-1908, with interest from the 29th of January, 1909, at which date Blakemore went out of office. It is contended interest did not begin to accrue until suit was filed. The statute (Sec. 3771, R. S. 1909) provides that the treasurer "at the end of his term . . . shall immediately make such settlement, and deliver to his successor in office . . . all money belonging to the county." In Clark County v. Hayman, 142 Mo. l. c. 434, 435, it was held the failure to comply with this requirement was a breach of the bond and that no order of the county court requiring him to comply was necessary. In other words, the balance in his hands became due by force of the statute. As a consequence he and his sureties are liable for interest from the end of his term. It is unnecessary to decide whether, as is held elsewhere, he is liable for interest from the time a conversion occurs.

IV. The treasurer did not deposit the funds separately. He mingled them all in depositing them. The court instructed, in effect, that if Blakemore was indebted to the county and paid it a sum less than the total due and made no application of the **Application of Payment.** payment to particular funds, the county had the right to apply the payment as it deemed best, and the bringing of this suit upon the bond in question "is evidence which will authorize you to find there was an application of the payment to his indebtedness, if any, to all funds other than those covered by the bond sued on."

It is urged (1) a record of the county court is essential to show application of the payment; (2) it is not shown the county court ordered this suit brought, and (3) the filing of suit does not tend to prove an application of the payment.

In case Blakemore failed to direct the application of the fund, the county had the right to do so. [State ex rel. v. Smith, 26 Mo. l. c. 231, 233; Henry County v. Salmon, 201 Mo. 166, 167.] Appellants went through the trial without raising any question whether this action was ordered by the county court. What they assumed throughout the trial, we must assume here. The bringing of the action for the whole deficiency on the bond involved would have bound the county, as an application of payment, in any other proceeding. [Haynes v. Waite, 14 Cal. 446, and cases cited.] It was substantial evidence of the county's intent to make the application to the funds mentioned in the instruction. [Starrrett v. Barber, 20 Me. l. c. 461.] There is no question of "shifting responsibilities" by the application made. The bond was executed in contemplation of every applicable principle of law, the law of the application of payments as well as any other.

V. The court instructed, in substance, that if Blakemore failed to pay over a balance he owed, and if it

was found he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, "then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on," etc.

It is contended (1) estoppel was not pleaded, and (2) was not proved.

There was ample evidence of the facts predicated in the instruction. There was no objection to the evidence. Though not pleaded, estoppel was available. There was no opportunity to plead it and it was not the basis of the action. [Long v. Coal & Iron Co., 233 Mo. l. c. 738.] Blakemore testified he mingled the funds and "If there was any shortage it was impossible for me to tell where it was;" i. e. in what funds. Ordinarily, whatever estops the principal, estops the sureties. Blakemore was in no position to assert the shortage was in the school funds. He had brought about a condition which rendered it impossible to determine where it was. To permit him to produce this condition and then defeat a suit against him on the ground that respondent could not prove something he had rendered impossible of proof, would be to permit him to profit by his own wrong. Such a defense is not permissible. Public policy forbids recognition of a defense which would make it possible for every county treasurer, by merely mingling funds, to defeat all liability on his bond. The instruction is not open to the objection made.

VI. Evidence of Blakemore's good character was inadmissible. His character was not attacked in such sense, if in any, as to render such evidence competent. [Bank v. Richmond, 235 Mo. l. c. 542, and cases cited.]

Good
Character.

VII. Certain evidence was offered for a specified purpose. It was rejected. Appellants now contend it was competent for other purposes and it was error to exclude it. Having made their offer and secured a ruling on specific grounds, appellants cannot now con-

State ex rel. Dunklin County v. Blakemore.

vict the court of error by assigning reasons not given when the offer was made. [Fearey v. O'Neill, 149 Mo. l. c. 473.]

VIII. Other questions are raised, but are disposed of by the conclusions reached in preceding paragraphs.

Affirmed. All of the judges concur; *Bond, J.*, in result.

INDEX.

ACCORD AND SATISFACTION.

1. **Part Payment: Receipt in Full: Consideration: Doubt as to Amount Due.** A part payment of a debt unquestionably due will not discharge the entire debt, even though receipted in full and based upon an understanding or agreement that it is payment in full, for there is no consideration to support the agreement. But where there is an honest doubt between the parties as to the amount due, and after due consideration the creditor yields to the debtor's views and accepts what the debtor concedes to be due and gives a receipt in full, and there is no fraud or other ground for equitable relief, the settlement is binding for the reason that it comes within the principle of accord and satisfaction. *Zinke v. Macca-bees*, 660.
2. ———: ———: **Consideration: Receipt Not Necessary.** To make a settlement binding on the creditor as an accord and satisfaction, neither a receipt in full nor even an agreement to accept a part for the whole is necessary, if the creditor knows there is reasonable doubt as to the amount due and accepts the part tendered in full satisfaction. *Ib.*

ACCOUNTING.

1. **Foreign Corporation: Supervision by Domestic Courts.** A court of equity, by statute and independently of the statute, has power to exercise a supervisory control over a foreign corporation, whose chief office, principal place of business and tangible property are in this State and whose directors and other officers reside here, and at the request of its stockholders, showing fraud, deceit and waste by its managers and directors, to entertain a bill asking for an accounting and the appointment of a receiver. [*Distinguishing State ex rel. Life Ins. Co. v. Denton*, 229 Mo. 187, and *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78.] *State ex rel. v. Reynolds*, 113.
2. **Pleading.** Pleadings for an accounting are liberally construed, and where the allegations substantially state a case, a demurrer to the petition should be overruled. The bill must be interpreted by employing in its aid all reasonable interferences from the facts stated and all implications and intendments its terms will afford, in support of any relief competent for the court to grant. *Ib.*
3. ———: **Profit on Company Stock.** An allegation in the petition of stockholders against the president and directors of a corporation that the president bought 300 shares of its stock from a stockholder at \$40 a share for the use of the company and sold it at \$60 per share, at a profit of \$2000 to himself, states a specific and sufficient ground for an accounting. *Ib.*
4. ———: **False Entry on Books.** A charge by a stockholder in his petition that the president and directors purchased certain articles for the corporation at \$17,000 and then caused entries to be made on the books showing an expenditure of \$22,000 on that account, will authorize an accounting. *Ib.*

ACCOUNTING—Continued.

5. ———: Removal of President of Corporation. A bill by a stockholder which seeks to have the president of the corporation removed on the ground that he draws an exorbitant salary, stating facts which tend to show that his salary is exorbitant, is not demurrable. *Ib.*

ACCOUNTS STATED.

City Treasurer: Custodian of City's Moneys: Exonerated by Council. The board of aldermen is powerless to exonerate a city treasurer from liability for the balance of a city fund deposited in a bank, where the amount of such balance is undisputed; and where there is no dispute as to the amount, the reports of the treasurer and the report of an auditing committee which examined one of them does not constitute an account stated. *University City v. Schall*, 667.

ACCRETIONS.

1. **Salutary: Intervening Creek.** If the accretions formed upon the old river bank and extended across in front of the mouth of a creek, they became at once a part of the land reaching the bank at that point, and a subsequent cutting by the creek of a channel through the accretions would not affect the title thereto; and if the evidence shows that in seasons of high water accretions would form along the old river bank, near and in front of the mouth of the creek, that the creek itself would be filled with silt for some distance back of its mouth, that as the high waters receded the creek would force its way through these accumulations, and that the deposits were made from the river bank outward, in the creek and on both sides of it, it cannot be ruled that the waters of the creek separated the accretions from the river bank. *Miller v. Bufton*, 35.
2. **Judgment: In Proportion to Frontage.** A judgment which awards accretions in proportion to the original river frontage prior to their formation, is in accord with well recognized legal principles. *Ib.*

ACTIONS.

1. **Scire Facias: Forfeited Bond: Civil Action: Statutory Construction.** A *scire facias* proceeding on a forfeited bond, in so far as the nature of the proceeding itself is concerned, is a civil action, the bond or recognizance being nothing more than a formal confession of debt. Therefore a literal compliance with the statute requiring a bond to be taken for a bailable offense is not necessary, but the statute will be so construed as to effectuate the purpose for which it was enacted. *State v. Allen*, 391.
2. ———: Bond to Appear at Same Term. A bond given by an accused for his appearance from day to day during the June term of court then in session and from day to day during the next September term, which was not a term designated by the statute, but a part of the June term, notwithstanding the statute says a recognizance shall be taken for his appearance "on the first day of the next term," is enforceable against the surety upon default of the accused to appear at the September term; such statute, not being penal in so far as the *scire facias* proceeding is concerned, is not to be construed according to its strict letter, but in a manner to effectuate the purpose for which it was enacted, which was to secure the presence of the accused in court by authorizing

ACTIONS—Continued.

him to substitute his voluntary contractual obligation for his physical custody. *Ib.*

3. ———: ———: **Statute of Jeofails.** The Statute of Jeofails (Sec. 5019, R. S. 1909), declaring that no proceeding upon a recognizance shall be defeated on account of any defect in form, or omission of recital or condition of undertaking therein, or other irregularity, is a part of the statute authorizing the giving of bonds or recognizances and requires said latter statute to be liberally construed in a manner to effect its purpose to secure the appearance of the accused for trial at the time specified. *Ib.*
4. **Premature Suit.** A suit filed in December, 1913, for the taxes assessed in 1912, which were payable in 1913, is premature, because the taxes were not delinquent until January, 1914. *State ex rel. v. Fleming, 509.*

APPEALS.

1. **Public Utility: Reduction of Rates: Suspension During Appeal: Money Earned Belongs to Company.** Where the Public Service Commission, in order to test the reasonableness of rates charged by a gas company, ordered it to reduce its rates to specified maximums for a period of three years, and retained jurisdiction in order that a proper final order might be made after the test was tried out, and on appeal by the company to the circuit court the order was affirmed, but the court, pending an appeal to the Supreme Court, suspended the order and impounded the excess in rates over those fixed by the Commission, and its judgment was affirmed by the Supreme Court, the gas company is entitled to the excess collected during the time the appeal was pending in the Supreme Court; for, the order having been suspended, the company was lawfully entitled to adhere to its former rates until the judgment of affirmance was rendered. *State ex rel. Watts Eng. Co. v. Pub. Serv. Com., 108.*
2. **By Relators in Quo Warranto.** The individuals at whose request a proceeding in the nature of *quo warranto* has been instituted by the prosecuting attorney to determine the right of respondents to exercise the powers of school directors have the right to prosecute an appeal after said proceeding has been dismissed. *State ex rel. v. Long, 169.*
3. **Affidavit: Made by Agent.** An affidavit for an appeal, made by appellants' attorney as their agent and containing the required statutory allegations, is sufficient. *Ib.*
4. **Appellate Practice: Motion to Quash Execution and Retax Costs: Treated as One.** Defendant filed its motion to tax costs, and that being overruled filed its motion to recall, quash and set aside an execution theretofore issued on a judgment in favor of plaintiff, and in said motion and as one ground thereof set forth in full the prior motion to tax costs, which motion was sustained as to the matter of retaxing costs, but the judgment ignored the other grounds set up in the motion for quashing the execution. Thereupon plaintiff filed his motion to set aside the "judgment upon the motion to retax costs," which being overruled he appealed. *Held*, that, as the motion to quash the execution and to retax the costs were treated as one motion at the hearing, and as the bill of exceptions covers the proceedings had at said hearing, plaintiff's appeal from the order retaxing the costs is maintainable, and the court's action is for review. Appellant is not to be denied a

APPEALS—Continued.

review because he followed in the footprints made for him by respondent. *Burton v. Railroad*, 185.

5. **Appellate Practice: Weight of Evidence: In Law Case.** A claim against an administrator for the recovery of the value of bonds borrowed by decedent from claimant and never returned, commenced in the probate court and taken by appeal to the circuit court, is an action at law, and if the verdict in favor of claimant is supported by substantial evidence, the trial court is within the law in overruling a demurrer thereto, and it is not the province of the appellate court to pass upon the weight of the evidence. *Townsend v. Schaden*, 227.
6. **Appellate Practice: Error Must Be Assigned.** Error must be assigned and shown before a reversal is warranted in a civil case. *Hiemenz v. Harper*, 380.
7. ———: ———: **School Property: Special Tax Bill: Moral Obligation.** Plaintiff brought suit to enjoin a school board from ordering the payment, out of school funds, of special tax bills, issued against school property, in payment for a sewer. The trial court held school property was exempt, but refused to grant an injunction "on the ground that the board were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Plaintiff on appeal confines his assignment of error to the question whether special tax bills can be legally enforced against school property, and fails to assail the ruling on which the court rested its judgment. *Held*, that all that appellant urges may be conceded and yet the judgment rests upon the independent and only ground on which the court placed it, and there being no assignment that the court erred in resting it upon that ground, the judgment must be affirmed.
8. **Public Road: Conflicting Evidence.** A proceeding to establish a public road is an action at law, and if the evidence on the question of its public necessity is conflicting and there is ample evidence to justify the court's finding that there is a public necessity for the road, the Supreme Court will not interfere with the finding. In *Matter of Critzer*, 514.
9. ———: **Damages: Jury Trial: After Appeal.** Upon an appeal from the judgment of the county court "in ordering the establishment of a public road," the appellants are not entitled to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land, or to have the question of damages considered at all. An appeal from the judgment of the county court opening or establishing the road, and from that order alone, does not give the circuit court jurisdiction to try *de novo* the question of damages adjudged by separate judgments in the county court. *Ib.*
10. ———: ———: **No Request for Jury Trial.** If appellants made no attempt in the circuit court to have a retrial of the question of damages, they cannot be heard to complain in the Supreme Court that they were denied a jury trial on that question. *Ib.*
11. **Quieting Title: Findings of Trial Court: Binding On Appeal.** If the suit brought under Section 2535 is an action at law, the findings of the trial court, if supported by substantial evidence, are binding on the appellate court. *Koehler v. Rowland*, 573.
12. **Errors of Trial Court: Attack by Respondent.** Respondent on appeal may attack erroneous rulings of the trial court for the

APPEALS—Continued.

purpose of sustaining his judgment. He may point out errors committed against him in order to sustain a judgment in his favor. Where plaintiff objected to the admission in evidence of a deposition, and was overruled by the referee, who nevertheless made findings in his favor, with which he was satisfied and which were approved by the trial court and judgment was rendered in his favor, he has the right on defendant's appeal, in an effort to sustain his judgment, to object to the competency of the deposition, and ask the court to exclude it from consideration, because it was erroneously admitted in evidence by the referee. *Savings Bank v. Denker*, 607.

13. **Evidence Not Preserved: Reference Case.** If the evidence in regard to an item allowed by the referee in a compulsory reference case of which appellants complain is not preserved in the abstract, the appellate court will not review the matter. *Ib.*
14. **Habeas Corpus: Jurisdiction.** The Supreme Court has no appellate jurisdiction in a *habeas corpus* proceeding, for an appeal does not lie in such a proceeding. *In re Webers*, 677.

APPROPRIATIONS

1. **Inheritance Tax: Payment into State Treasury.** Devisees or heirs, whose inheritances or devises have by the probate court been charged by its judgment with taxes according to the Inheritance Law, are not, in a *certiorari* to that court, by which they attack the constitutionality of said act, in any position to raise the point that the act violates that portion of the Constitution which provides that no money shall be diverted from the State Treasury except by proper appropriation bills. Whether that portion of the act requiring the money to be paid into the State Treasury and providing that upon proof of an erroneous payment the amount of the tax erroneously paid may be refunded, is valid or invalid, does not concern them, and is not in the case, and therefore is not decided, for even if that part of the act is invalid the rest of it is not. *State ex rel. McClintock v. Guinotte*, 298.
2. **School Property: Special Tax Bill: Moral Obligation.** Plaintiff brought suit to enjoin a school board from ordering the payment, out of school funds, of special tax bills, issued against school property, in payment for a sewer. The trial court held school property was exempt, but refused to grant an injunction "on the ground that the board were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Plaintiff on appeal confines his assignment of error to the question whether special tax bills can be legally enforced against school property, and fails to assail the ruling on which the court rested its judgment. *Held*, that all that appellant urges may be conceded and yet the judgment rests upon the independent and only ground on which the court placed it, and there being no assignment that the court erred in resting it upon that ground, the judgment must be affirmed. *Hiemenz v. Harper*, 380.
3. **Contract With State: Proof of Existence: Finding by Legislature.** A finding by the Legislature of a fact upon which the right to enact a law depends is not to be further inquired into by the courts. So where an appropriation act appropriated a definite sum of money to private persons "in full payment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds," and a contract

APPROPRIATIONS—Continued.

for such a plan could under the statute have been made on behalf of the State with said board, it will be taken as true that an agreement was made between said persons and said board, under which the claim arose. And even if the court were to reserve the right to make an independent finding on the question of fact on the ground that the constitutionality of the act depends on a question of fact, the prior finding of the Legislature that such fact did exist would be treated as *prima-facie* true.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that the plan alleged to have been submitted was rendered voluntarily, with no implied or express obligation on the part of the board to pay therefor, if the services tendered were not accepted, and the Constitution prohibits the Legislature to appropriate money for a mere submitted plan. *State ex rel. Kelly v. Hackmann*, 636.

4. ———: **Presumption of Validity: Judicial Question.** The courts will presume that the Legislature passed upon the validity of an agreement made by the board which was empowered to make it on behalf of the State, before it appropriated money to pay the obligation which it expressed, unless it is deemed a clear violation of the Constitution; but, nevertheless, the validity of the agreement is a judicial question, and the act making the appropriation to pay the claim will not be upheld if the agreement is one that the Constitution makes null and void. *Ib.*
5. ———: **Fund Commissioners: Power to Contract.** Section 11900, Revised Statutes 1909, which authorized and empowered the Board of Fund Commissioners "to enter into contracts, and to refund any part of the bonded indebtedness of the State," when read in connection with Section 11890, which authorized them to "perform all such acts and things as may be required of them by law," and the amendment of 1913 to Section 11900, which "authorized and empowered" said board "to enter into contracts and to refund," did not restrict their duties to refunding bonds, but authorized them to make contracts for the sale of Capitol bonds authorized by the Act of March 16, 1911.
Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that neither said statutes nor any other invested the board with authority to contract to pay for a plan to sell bonds voluntarily submitted to it and never accepted. *Ib.*
6. ———: **Necessary Incidents of Power.** In view of the inhibition of the Constitution (Sec. 24, art. 4) that the General Assembly shall have no power "to pay or to authorize the payment of any claim hereafter created against the State . . . under any agreement or contract made without express authority of law," the power of the Board of Fund Commissioners to enter into a contract relating to the sale of the State's bonds must be strictly construed, and no such broad meaning of the word "necessity" as "convenient" and "proper" is to be tolerated; but as the board was given express authority to sell the Capitol bonds and power to enter into contracts, they were also given, as necessary to the exercise of such power, the further power to enter into an agreement with private citizens to submit to them a plan to sell the bonds; and as the Legislature in an appropriation act recites that such plan was submitted, the act appropriating money to pay for the service rendered is not without express authority of law.

APPROPRIATIONS—Continued.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that no appropriation act derives any operative force from its own terms alone, but something more, usually some statute, is necessary to authorize the withdrawal of money from the public treasury; and as the statute authorized the board to sell the bonds at the best advantage and required the proceeds to be applied exclusively to the building of a new capitol, furnishing the same and the acquirement of additional ground for a site, and the Constitution prohibits the Legislature to appropriate money in "payment of any claim . . . under any contract made without express authority of law," the Board of Fund Commissioners had no power to enter into a contract to pay for a plan to sell the bonds, and the General Assembly had no power to appropriate money to pay for a plan for their sale, voluntarily submitted by private persons and never accepted by the board, and no such power can be implied from the restricted language used, nor did any public necessity for the contract or the plan exist, and it is only when the public interest is involved that a necessity, as an incident to the power granted, can be said to exist. *Ib*.

7. —: **Capital Building Fund: Restricted Use.** The Capitol Building Fund having been increased from other sources than the proceeds of the Capitol bonds to an amount more than sufficient to discharge the obligation of a contract for a plan for selling the bonds, it cannot be held, as a fact, that an appropriation to pay said obligation is a diversion of the proceeds of the bonds, whose proceeds were by statute devoted to erecting a capitol, furnishing it and buying additional ground for a site; nor can it be held, as a matter of law, that the use of the proceeds to pay said obligation would be a diversion of them, since such payment was a necessary expense of floating the loan and therefore not an unlawful use of the proceeds. [WALKER, J., BOND, C. J., and WOODSON, J., dissenting.] *Ib*.
8. —: **Grant to an Individual: Constitutional Inhibition.** The restriction of Section 46 of Article 4 of the Constitution inhibiting the Legislature from granting public money to an individual, is laid upon gratuitous grants. It does not prohibit payment for services rendered the States; for instance, it does not prohibit the Legislature to appropriate money to pay private citizens for a plan submitted to the Board of Fund Commissioners to sell a large issue of bonds. *Ib*.
9. —: **Certification of Claim.** The State Capitol Commission was not entrusted with the sale of Capitol bonds, nor did it have anything to do with claims or demands incident to their sale, and consequently it was not necessary that it allow or certify a claim by private persons for a plan to sell the bonds submitted to the Board of Fund Commissioners. *Ib*.
10. **Judgment: Allowance in Excess of Demand.** Where the Legislature appropriated \$25,000 to pay relators' demand, and they agreed with the Governor, prior to his approval of the act, to reduce their demand to \$20,000, and they asked for a writ to compel the State Auditor to issue them a warrant for \$20,000, and from a judgment against them in the circuit court they appeal, it would be inconsistent with the theory on which the case was tried and submitted in that court, for the Supreme Court to allow them \$25,000. *Ib*.

ARBITRATION.

1. **Survey: Arbiters: Separate Report: Umpire.** A stipulation between two adjoining claimants to a parcel of land that the dividing line between their respective tracts should be ascertained by two surveyors, one to be chosen by each, and that if they could not agree a third, named in the stipulation, "shall decide all matters of difference between said two surveyors," did not require that the three should act together and join in one report, but the third could accept the parts of the line agreed upon by the two and proceed to survey the part not agreed upon by them, and file a separate report setting forth his finding. The stipulation did not require that there be one report concurred in by a majority, nor did it require that the third act jointly with the other two. *White v. Herminghausen*, 687.
2. ———: ———: ———: **Understanding of Parties.** Where there is any ambiguity as to the meaning of a stipulation, what the parties did under it, without objection, with the full knowledge of each other, indicates its meaning. *Ib.*

ARBITRARY POWER OF OFFICER. See *Cities and Towns*, 10, and 16 to 18.

ATTORNEYS.

Evidence: Champerty: Concealed Interest in Suit: Compulsory Testimony. It is not prejudicial error to refuse to compel the attorney of record for plaintiffs to testify whether he has a deed from plaintiffs to the lands in suit, or a contract with them whereby he is to receive an interest in the land in case judgment is rendered in their favor, for he is just as much concluded by a judgment against them as he would be had he been joined as a party. *Bell v. George*, 17.

BAIL. See *Bond, Bail*.

BENEFIT ASSESSMENTS.

School Property: Special Tax Bill: Moral Obligation. Plaintiff brought suit to enjoin a school board from ordering the payment, out of school funds, of special tax bills, issued against school property, in payment for a sewer. The trial court held school property was exempt, but refused to grant an injunction "on the ground that the board were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Plaintiff on appeal confines his assignment of error to the question whether special tax bills can be legally enforced against school property, and fails to assail the ruling on which the court rested its judgment. *Held*, that all that appellant urges may be conceded and yet the judgment rests upon the independent and only ground on which the court placed it, and there being no assignment that the court erred in resting it upon that ground, the judgment must be affirmed. *Hilmenz v. Harper*, 380.

BOND, BAIL.

1. **Scire Facias: Forfeited Bond: Civil Action: Statutory Construction.** A *scire facias* proceeding on a forfeited bond, in so far as the nature of the proceeding itself is concerned, is a civil action, the bond or recognizance being nothing more than a formal confession of debt. Therefore a literal compliance with the statute

BONDS, BAIL—Continued.

requiring a bond to be taken for a bailable offense is not necessary, but the statute will be so construed as to effectuate the purpose for which it was enacted. *State v. Allen*, 391.

2. ———: **Bond to Appear at Same Term.** A bond given by an accused for his appearance from day to day during the June term of court then in session and from day to day during the next September term, which was not a term designated by the statute, but a part of the June term, notwithstanding the statute says a recognizance shall be aken for his appearance "on the first day of the next term," is enforceible against the surety upon default of the accused to appear at the September term; such statute, not being penal in so far as the *scire facias* proceeding is concerned, is not to be construed according to its strict letter, but in a manner to effectuate the purpose for which it was enacted, which was to secure the presence of the accused in court by authorizing him to substitute his voluntary contractual obligation for his physical custody. *Ib.*
3. ———: ———: **Statute of Jeofails.** The Statute of Jeofails (Sec. 5019, R. S. 1909), declaring that no proceeding upon a recognizance shall be defeated on account of any defect in form, or omission of recital or condition of undertaking therein, or other irregularity, is a part of the statute authorizing the giving of bonds or recognizances and requires said latter statute to be liberally construed in a manner to effect its purpose to secure the appearance of the accused for trial at the time specified. *Ib.*

BOND, CASHIER'S.

1. **Suit on Bond: Admission of Principal: Binding on Sureties: Res Gestae.** An admission of the principal in an employee's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety in the trial of a suit on the bond. And the words "while engaged in the discharge of his duties" mean that any statement made by the principal during the continuance of the term for which the sureties are bound, concerning any transaction during that term, is admissible against the sureties. So that where an investigation of the cashier's shortage was begun on the fifth of the month and the directors instructed him to make no further entries on the books, and other persons were put in charge of them, although he continued in and around the bank until his discharge on the ninth, a written statement explaining the discrepancies and his false entries made to a director and signed by him on the seventh, was competent evidence against the sureties on a bond which covered the period and made them liable for any loss occasioned by his act. *Savings Bank v. Denker*, 607.
2. **Directors' Knowledge of Dishonesty: Concealment: Neglect: Liability of Sureties.** If the officers and directors of the bank had knowledge of the cashier's dishonesty and accepted the bond with such knowledge, without disclosing to his sureties what they knew of his character, the sureties are not liable. But if they were only careless and negligent in failing to ascertain his character, the sureties are liable. *Ib.*

BOND OF COUNTY TREASURER. See *County Treasurer*.

BONDS, ROAD. See *Road District*.

CAPITOL, STATE. See *Legislative Power*.

CARRIERS.

1. **Injury to Fellow Passenger: Liability.** A common carrier is bound to exercise the utmost practicable care for the safety of its passengers, to safely transport them, and to protect them while in transit from violence and insults from all persons on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damages therefor; but the duty does not amount to an absolute guaranty that a passenger will be transported with absolute safety or that he will not be insulted or injured by an intoxicated fellow-passenger. The rule means that the conductor and other trainmen must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for injuries inflicted by one passenger upon another, if in the exercise of that degree of care the assault or injury is not to be foreseen. *Lige v. Railroad*, 249.
2. ———: **Sudden and Unexpected Assault.** A common carrier is not liable in damages to a passenger for injuries resulting from a sudden assault by another intoxicated passenger, who, without any previous threat or verbal altercation, who was not previously boisterous or insulting in his talk or conduct and who gave no evidence that he was intoxicated except that he was talking generally and having a jolly good-time, suddenly seized an iron wrench and struck on the head the other passenger, who was a total stranger to him. *Ib.*

CHAMPERTY.

Evidence: Concealed Interest in Suit: Compulsory Testimony. It is not prejudicial error to refuse to compel the attorney of record for plaintiffs to testify whether he has a deed from plaintiffs to the lands in suit, or a contract with them whereby he is to receive an interest in the land in case judgment is rendered in their favor, for he is just as much concluded by a judgment against them as he would be had he been joined as a party. *Bell v. George*, 17.

CITIES AND TOWNS.

1. **Public Service Commission: Power to Fix Telephone Rates.** The Public Service Commission has power by order to fix telephone charges at rates exceeding maximums prescribed in a franchise granted by a city ordinance to a telephone company prior to the enactment of the Public Service Act of 1913. Such an order does not impair the obligation of contracts evidenced by such ordinance. [Overruling *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, so far as conflictive.] *City of Fulton v. Pub. Serv. Com.*, 67.
2. ———: ———: **Impairment of Individual Contracts: Police Power.** All contracts made for individual subscribers by the city with a public service telephone company, through the medium of ordinances, are made in contemplation of the State's power to fix rates. Individuals cannot abridge the police power, but all such contracts are made subject to revision by an exercise of that power by the State, and its exercise does not impair the obligations of such individual subscribers. *Ib.*
3. **Franchise Ordinance: Contract.** The passage of an ordinance by the council of a city of the third class and its acceptance by a water company, by which it is provided that the rent on city hydrants shall be a named sum per year, constitute a contract be-

CITIES AND TOWNS—Continued.

tween the city and company, whether or not the ordinance is submitted to a vote of the people. State ex rel. v. Pub. Serv. Com., 201.

4. **Water Rate: In Excess of Ordinance Rate: Power of Public Service Commission.** The Public Service Commission of Missouri has the lawful right to fix the rate for hydrant water, so far as the city is concerned, in excess of the rate fixed by an existing ordinance. Ib.
5. **Police Power: Abridgment: Nullifying Existing Contracts.** The State of Missouri cannot divest itself of the right to exercise its police power. The Constitution declares that "the exercise of the police power of the State shall never be abridged," and such power cannot be contracted away, nor can the Legislature authorize a municipal corporation to contract it away. A statute which authorizes a city to contract for water service to the city and the general public may be so modified as to delegate to a legislative agent the power to fix rates different from those mentioned in such contract, for the Legislature cannot authorize a municipal corporation and a public service corporation to make a contract which will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract. Ib.
6. **Street and Lots: Plats and Measurements: Conflict.** By Section 6573, Revised Statutes 1879, the platting of ground had the same legal effect to dedicate to public use the streets and alleys therein described as would a conveyance directly to the city; and when the owners of the lots and blocks fronting on said streets and alleys as shown by the plat sell them to third parties, the title to the streets and alleys cannot be questioned by the city or by the purchasers of other lots, nor can the rights of the purchasers of lots to access to the streets and alleys as shown by the plat be questioned by purchasers of other lots embraced within the plat. [Following *Laddonia v. Day*, 265 Mo. 383.] *Wright v. City of Joplin*, 212.
7. ———: ———: ———: **Plat Determinative.** When the plat of an addition has been executed and filed in conformity with the statute, the streets and alleys indicated by the plat as actually fitted to and laid out on the land, and not as indicated by calls of measurements, courses and distances as shown by field notes of the surveyor, became vested absolutely in the city for the use of the public. If there is a conflict between said plat and the measurements of a survey—if the plat designated certain streets and they were actually laid off on the surface of the ground by the dedicators as indicated by it and as subsequently used by the public, and lots were sold and improved in conformity to stakes and boundary lines, which also were in conformity to the plat, although the field notes attached to and filed with the plat described the tract as 1320 feet square, when as shown by the plat the tract was 1325 feet east and west, and as shown by a subsequent survey was 1300 feet on the north line thereof and 1299.7 feet on the south line—the plat must prevail, and the city cannot change the lot lines as shown by it, nor re-establish the streets and alleys in accordance with the actual measurements. Ib.
8. **Theatre: Amending Petition After Proof: Changing Defense: Permissive Ordinance.** Where the petition charged that a designated ordinance prohibited inequalities in the floor levels of a theater and a violation thereof, and the answer set up another ordinance containing a like prohibition but subject to exception on written

CITIES AND TOWNS—Continued.

permission of named officials and contained an averment of such permission, and defendant's own evidence totally failed to show any such permission, it was not error to permit plaintiff, after the evidence was in, to amend her petition by interlineation to conform to the proof by adding a charge that the ordinance pleaded by defendant had been violated. The amendment to the pleading did not change the defense, and was right. *Oakley v. Richards*, 266.

9. ———: **Floor Level: Inequalities Upon Permission: Inspection.** Where the ordinance declared that "no steps shall be permitted in any aisle or in any part of the auditorium floor" of a theater "except by written permission" of named officials, permission cannot be implied from a mere inspection by such officials. *Ib.*
10. ———: **Validity of Ordinance: Steps in Aisle: Permission of Officials.** An ordinance prohibiting steps in the aisle or on any part of the auditorium floor of a moving-picture theater "except by written permission" of designated officials does not vest an arbitrary power in said officials and is not for that reason invalid. In case a city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from a designated official; and a city may lawfully prohibit absolutely inequalities in floor levels in darkened theaters, and matters of detail in enforcing ordinances otherwise valid may be left to designated officials. *Ib.*
11. **Public Utility: Discrimination in Rates: Free Light to City.** A provision in the franchise granted by a city to an electric light company whereby the company is required to furnish the city "without charge, lights for its offices and fire house, to the extent of one hundred kilowatt hours per month," worth \$40 per year, is not an unreasonable discrimination in favor of the city, in view of the fact that the city's annual account for street lights exceeds \$2,000. *State ex rel. v. Atkinson*, 325.
12. ———: ———: ———: **Rest of Franchise Valid: Collateral Proceeding.** Even though the clause in a franchise whereby the company agrees to furnish electricity to the city for its offices and fire house is unlawful discrimination, it does not follow that the remaining portions of the franchise are void. If the city and company are willing to strike it out, another company, which failed to secure a franchise, should not be heard to complain. Nor could its invalidity be adjudicated in a collateral proceedings. *Ib.*
13. **Negligence: Obstruction of Street by Plaintiff.** The fact that the plaintiff maintained a naphtha tank in the street in violation of a city ordinance does not of itself prevent recovery by him for damages when the railroad company backed a freight car off the end of a switch track in the street, which passed on to and struck the tank, causing the naphtha to take fire and thus burning his factory in connection with which the naphtha was used. Unless the illegal obstruction was the proximate and efficient cause of the injury it does not totally bar recovery, nor relieve the railroad company for at least nominal damages for the negligent injury done to the tank. *Kupferle Co. v. Terminal Ry. Co.*, 451.
14. ———: **Contributory: Maintenance of Naphtha Tank.** Whether or not the plaintiff foundry company was guilty of negligence in maintaining a tank containing naphtha, which it used in connection with its factory, in the street, against which the trainmen shoved a freight car, after running it off the end of the switch track in the street, causing an explosion and a fire in the

CITIES AND TOWNS—Continued.

factory, and in covering it with a wooden box painted red, with no sign to indicate that naphtha was kept in it, is a question for the jury, and it cannot be said as a matter of law that the keeping of the tank in said manner and at said place was negligence *per se*. *Ib*.

15. ———: **Explosive: Violation of Ordinance.** The keeping of explosives in violation of a statute or ordinance is negligence. *Ib*.
16. **Ordinance: Arbitrary Will of Officer.** Neither the Legislature nor the city can commit to the unrestrained will of a single officer the power arbitrarily to favor one individual in the use of streets and to deny such favors to others. *State v. Allen*, 501.
17. ———: ———: **Drivers: Obedience to Direction of Police.** An ordinance declaring that "drivers must at all times comply with any direction by voice or hand of any member of the police force, as to stopping, starting, approaching or departing from any place" puts the citizen in the arbitrary power of the police officer regardless of the circumstances of the case, is subject to the objection that it deprives persons of equal protection of the laws, and is invalid; and however meritorious may be the city's case against an offender, he cannot be convicted of its violation. *Ib*.
18. ———: ———: **Entrance to Building.** A large eight-story office building fronting on a busy street must have an entrance from the street, as well as from the sidewalk; and a proper place marked off between posts and placarded with a sign warning all persons not to stand their vehicles between the posts, is a reasonable regulation; but an ordinance making the use of such placarded entrance dependent upon the direction of a policeman, is invalid. *Ib*.
19. **City Treasurer: Custodian of City's Moneys: Agent of Council.** It is not necessary to discuss Section 9371, Revised Statutes 1909, declaring that "the mayor and board of aldermen shall have the care, management and control of the city and its finances," in view of the provisions of Section 9396, declaring that "the treasurer shall receive and safely keep all moneys, warrants, books, bonds and obligations entrusted to his care, and shall pay over all moneys, bonds and other obligations of the city on warrants or orders duly drawn, passed or ordered by the board of aldermen," and in view of a city ordinance declaring that the treasurer shall "pay over all moneys belonging to the city according to law," and in view of the further fact that the money actually passed into his hands as treasurer. In such case he was not the agent of the mayor or board of aldermen, although they directed him to deposit the money with a certain trust company, subject to their control. The board has no power to interfere with the disposition of city funds which have passed into his hands as city treasurer, whatever its views of the statute may be, and could neither usurp his duties nor exonerate him from liability for city funds in his hands. *University City v. Schall*, 667.
20. ———: ———: ———: **Public Policy.** Sound public policy does not permit a city treasurer to take into his possession in his name as city treasurer funds of the city of which he is treasurer, hold them for years in an account kept in his name as city treasurer, and when called upon for a balance, relieve himself by showing that the mayor and board of aldermen attempted orally to confer upon him the character of agent, so that he might hold

CITIES AND TOWNS—Continued.

the fund for them and withhold it from himself in his character as treasurer. *University City v. Schall*, 667.

21. ———: ———: ———: **Shown by Oral Evidence.** Whether or not the action of the board of aldermen in authorizing the city treasurer to act as their agent in depositing the city's moneys may be shown by oral evidence need not be determined, if the board by ordinance duly passed had no power to exonerate him from liability for city funds which actually came into his hands as city treasurer. *Ib.*
22. ———: ———: **Special Deposit.** The writing of the words "special deposit" upon the book of the bank in which a city fund was deposited by the city treasurer amounted to nothing under the circumstances of this case, in which there was no suggestion made that the fund was to be segregated from other moneys of the bank and kept intact as a special deposit. *Ib.*
23. ———: ———: **Exoneration by Council: Account Stated.** The board of aldermen is powerless to exonerate a city treasurer from liability for the balance of a city fund deposited in a bank, where the amount of such balance is undisputed; and where there is no dispute as to the amount, the reports of the treasurer and the report of an auditing committee which examined one of them does not constitute an account stated. *Ib.*

COMPENSATION FOR IMPROVEMENTS. See *Quieting Title*, 6 and 7.

COMPETITION IN PUBLIC SERVICE. See *Public Utilities*.

CONCEALMENT.

Cashier's Bond: Directors' Knowledge of Dishonesty: Neglect: Liability of Sureties. If the officers and directors of the bank had knowledge of the cashier's dishonesty and accepted the bond with such knowledge, without disclosing to his sureties what they knew of his character, the sureties are not liable. But if they were only careless and negligent in failing to ascertain his character, the sureties are liable. *Savings Bank v. Denker*, 607.

CONDEMNATION.

1. **Title to Land: Estoppel by Judgment: Adverse Claimants to Award: Determination of Title.** Commissioners appointed by the court to assess damages in a condemnation proceeding begun by a railroad company estimated the value of a right-of-way one hundred feet wide through forty acres of land, at one hundred dollars. Plaintiff at the time was in possession claiming title, and defendant held a recorded deed made by the sheriff as a result of an execution sale under a judgment for taxes obtained against the plaintiff, who at the time the tax judgment was rendered was the owner and under sentence for a felony. The railroad company did not pay the money into court, but defendant upon the filing of the commissioners' report filed an interplea alleging he was the owner of the land and that plaintiff had no title or interest therein and asking that the money be awarded to him, and plaintiff later filed a like interplea alleging he was the owner and that defendant's deed was void and asking that the money be awarded to him. The trial court rendered judgment adjudging the defendant to be the owner of the land and ordering that the money be paid to him when it was paid into court. It was not paid into court, but defendant testified that it was paid to

CONDEMNATION—Continued.

him. *Held*, that the judgment did not have the effect of transferring the title to defendant, but the contest related solely to the fund, and not to the land. *Held*, further, that the statutory proceeding for the fund was one *in rem* and jurisdiction cannot exist without the *res*, and the statute providing for an interplea only when the award is paid into court and that not having been done, the court had no jurisdiction to consider the title to the land or to award the fund to defendant. *Murphy v. Barron*, 282.

2. **Surface Water: Protection: Damages.** Overflow water from a stream is surface water, and the owner of land has the right by constructing embankments to shut off such surface water from his land without being liable in damages to the owner of another tract for the injury thus done. But that rule does not relieve a drainage district from responding in damages done to land between its levee and such stream by increasing the overflow of water on such land, for the drainage district does not own land or a right of way, but in seeking to condemn a right of way for its levee through the land of such owner must comply with the constitutional mandate declaring that "private property shall not be taken or damaged for public use without just compensation." *Drainage District v. Ham*, 334.
3. ———: ———: ———: **Levee Through Owner's Land: Increased Overflow.** The exceptors owned 118.95 acres of land bounded by a river. The drainage district took 8.1 acres of the tract for the right of way of its levee, and the levee was so constructed as to leave 30.95 acres of the tract outside of the levee and between it and the river. *Held*, that, as the drainage district did not leave all of exceptors' land between the levee and the river, but appropriated a part of it for the levee right of way, it was liable in damages for the increased overflow of the river waters on the 30.95 acres, under that provision of the Constitution that says that "private property shall not be taken or damaged for public use without just compensation," and cannot escape the payment of such damages on the theory that the owner of lands has the right to shut off surface water from his lands without being liable in damages to another owner for the injury thus caused, for the drainage district is not the owner of any land, but is seeking to condemn a right of way for the levee through, and not outside of, exceptors' lands. [Distinguishing *Jackson v. United States*, 230 U. S. 1, and *Hughes v. United States*, 230 U. S. 24.] *Ib.*

CONSIDERATION FOR SETTLEMENT. See *Accord and Satisfaction*.

CONSTITUTIONAL LAW.

1. **Guardian and Curator: Appointment: Insane Person: No Notice.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving *Hunt v. Searcy*, 167 Mo. 158.] *Shanklin v. Boyce*, 5.
2. **Statute: Unconstitutional Amendment: Prior Statute Restored.** If an existing statute be amended and reenacted, and be by the

CONSTITUTIONAL LAW—Continued.

amendment rendered unconstitutional, the original statute, upon judicial declaration of invalidity of the amended statute, automatically comes into force again. *State ex rel. v. Clark*, 95.

3. **Insurance: Rating Act: Unconstitutional Amendment of 1903: Restoration of Prior Statute.** The statute of 1898 declared that no fire insurance policy should contain a clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" or "making provision for a reduction of the loss or damage by reason of a failure to take out or maintain other insurance." In 1903 the statute was amended by adding a proviso that the inhibition "shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand or more inhabitants." *Held*, that, if the amendment had the effect to make the general inhibition a local or special law and for that or any other reason rendered the amended statute unconstitutional, the original act automatically came into force again, and if it was a valid enactment the general inhibition thereafter obtained. *Ib.*
4. ———: ———: **Repeal by Implication of Existing Statute: Inconsistency.** There is no inconsistency between the Insurance Rating Act of 1915 and Section 7023, Revised Statutes 1909, and consequently Section 7023 was not repealed by implication by said act. Section 7 of said act does say that a fire insurance company shall not "fix and charge any rate for fire insurance upon property in this State which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire," and Section 7023 declares that no insurance policy shall contain any clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" except in cities having one hundred thousand inhabitants or more; but there is a difference in the hazards and the amount of protection in such cities and in other parts of the State, and said Section 7, when the words "charges and credits" are read in the light of the next clause, means that it is only when the hazards and the protection against fire are the same that discrimination in rates is forbidden. *Ib.*
5. ———: ———: **Class Legislation.** Other things being equal classification in legislation on the basis of population is not unconstitutional. *Ib.*
6. **Intoxicated Passenger: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 438 (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicating liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the names of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitutions. *Lige v. Railroad*, 249.

CONSTITUTIONAL LAW—Continued.

7. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The Act of 1909, page 438 (Secs. 4710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United States which prohibit the enforcement of any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States. *Ib.*
8. **Descents and Distributions: Wills.** There is no constitutional provision restricting the power of the Legislature to change or modify the laws relating to descents and distributions or the laws relating to wills. *State ex rel. McClintock v. Guinotte*, 298.
9. ———: **Inheritance: Not Natural Right.** Inheritance of property is not an absolute or natural right. There is no constitutional provision which would prohibit the Legislature from changing or abolishing entirely the law as to descents and distributions, whether the transmission of property be by will or by intestacy. The right to inherit property is neither a natural right, nor a constitutional right in this State, but a right which the sovereign may grant or withhold, or may grant upon condition; and since there is no constitutional restriction, the Legislature may abolish or modify the laws permitting the transfer of property by will, as well as statutes governing descents and distributions, and may say what portion, upon an owner's death, shall be appropriated by the State, and to whom and in what proportions the balance shall go. *Ib.*
10. ———: **Inheritance Tax.** The right of the State to foreclose absolutely or partially the right to inherit property, by law or will, and to say what is to become of it when death forecloses the owner's right to control it, is not strictly the exercise of the taxing power, although the percentage to be retained by the State is designated in the statute as a tax, but is the exercise of that other power which inheres in sovereignty, unless restricted by the Constitution, to say what shall be done with the property upon the owner's death. The designation of the portion to be retained or collected by the State as a tax is, in effect, an expression of the condition upon which the persons designated in the statutes of descents and distributions or in the testator's will may take the property, and is not a tax at all. *Ib.*
11. ———: ———: **Constitutional Restrictions.** Since a statute prescribing the amount of inheritance taxes shall be imposed on devisees or inheritances is not an exercise of the taxing power, the validity of the statute is not affected by the divers and sundry constitutional restrictions relating to taxation. *Ib.*
12. ———: ———: **Repeal of Conflicting Statutes.** The fact that the Act of 1917 designates the portion of an inheritance which the State

CONSTITUTIONAL LAW—Continued.

is to retain or collect as a tax and that it does not in express words repeal statutes relating to descents and distributions or wills, does not make it an exercise of the taxing power. In spite of those things, it operates to repeal so much of those statutes as conflict with it. *Ib.*

13. ———: ———: **Due Process.** An inheritance law, which requires the probate court to appraise the property owned by a decedent, and to exempt \$15,000 of that devised to or inherited by his widow and \$5,000 of that devised to or inherited by each of his children, and requires an appropriation by the State of certain graduated percentages of the balance, as a condition of their receiving the inheritances or devises, not being an exercise of the power of taxation, does not in any sense deny to them due process of law. *Ib.*
14. ———: ———: **Title Act: Repeal of Conflicting Existing Statutes.** The title to the Inheritance Law of 1917 is in all respects sufficient, although the body of the act modifies or repeals, not by express words but by affirmative provisions, certain conflicting portions of the statutes relating to descents and wills, and no reference is made to them in the title. The body of the act is within the purview of the title and is clearly indicated by it, and that is sufficient; and, that being true, so much of the existing statutes as conflict with it will be held to be to that extent repealed or modified. *Ib.*
15. ———: ———: **Payment into State Treasury.** devisees or heirs, whose inheritances or devises have by the probate court been charged by its judgment with taxes according to the Inheritance Law, are not, in a *certiorari* to that court, by which they attack the constitutionality of said act, in any position to raise the point that the act violates that portion of the Constitution which provides that no money shall be diverted from the State Treasury except by proper appropriation bills. Whether that portion of the act requiring the money to be paid into the State Treasury and providing that upon proof of an erroneous payment the amount of the tax erroneously paid may be refunded, is valid or invalid, does not concern them, and is not in the case, and therefore is not decided, for even if that part of the act is invalid the rest of it is not. *Ib.*
16. ———: ———: **Local or Special Law.** The Inheritance Law of 1917 is a general and not a special or local law. *Ib.*
17. ———: ———: **Graduated: Unnatural Classification: Public Welfare.** The classifications made by the Inheritance Law of 1917, which exempts from the tax \$15,000 of decedent's property for the widow and \$5,000 for each child, and fixes a tax of one per cent on the balance up to \$20,000, and a tax of two per cent on the next \$20,000, and a tax of three per cent on the next \$40,000, and larger percentages, by a graduated scale, on larger amounts, is not unreasonable. The reasonableness of a classification is to be measured in the light of modern public welfare, and that may require a graduation of the tax in proportion to the amount of property given to the legatees or heirs by the State, which has the power to appropriate the whole of decedent's property upon his death. A law which classifies the recipients of the State's favor according to the amounts received is not an unreasonable classification. *Ib.*
18. ———: ———: **Taxation on Property: Uniform: According to Value: Public Purpose.** The Inheritance Law of 1917 is not an ex-

CONSTITUTIONAL LAW—Continued.

ercise of the taxing power of the State; but even if it be the exercise of the taxing power, it is not a tax upon property, but a tax upon the transmission or succession of property upon the death of the owner, and not being a tax upon property it does not violate the constitutional provision declaring that taxes can be levied only for a public purpose, or the provision that taxes shall be uniform upon the same class of subjects, or the provision that all property subject to taxation shall be taxed in proportion to value. *Ib.*

19. ———: ———: **Classification According to Burden.** There can be a class within a class, and a classification by an inheritance law of recipients of a decedent's property according to amounts received and kinship is not unreasonable. Property passes upon the owner's death to others only by the grace of the State, and if the burdens imposed as a condition of succession be graduated according to amounts received or relationships to him they do not constitute an unconstitutional classification, even though they be imposed by an exercise of the taxing power. But the provisions of the Constitution concerning taxation have reference to those burdens or taxes fixed by law which are recurrent at fixed periods, not to duties imposed which occur only once, and hence they are not applicable to what is ordinarily denominated an inheritance tax. *Ib.*
20. **Legislature Power: How Far Plenary.** The Legislature of a State, unless fettered by either the State or Federal Constitution, is vested, in its representative capacity, with the plenary power of the people, and can legislate at will. In consequence, no legislative act will be adjudged to be repugnant to the Constitution if any reasonable doubt of its constitutionality exists in the judicial mind. *Wire Co. v. Wollbrink, 339.*
21. **Income Tax. In Proportion to Value: Property.** A tax on income is not, in the constitutional sense, a tax on property, and hence the provision of the Constitution requiring that "all property subject to taxation shall be taxed in proportion to value" does not render invalid the Income Tax Law of 1917 which imposes a tax upon "the income of a taxable person." The word "property" in that clause was meant to include only those distinct classes of property which, because of their peculiar nature can be measured in value, become the object of taxation independent of the owner, and are susceptible by proper procedure, to lien or seizure for the enforcement of the tax. Prior to the adoption of the Constitution of 1875 the word "property," by judicial decision, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue, and when used in said Constitution it was not intended to include the usufruct of property, nor the earnings of physical or mental labor.
Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is property and a tax on incomes is a direct tax on property. Income is always paid in money or kind, that is, in real or personal property from which it accrues. Net income is the original and sole source of all existing private property. The very meaning of the word income is that it is "that gain which proceeds from labor, business, property or capital of any kind;" and this is substantially the definition given, in more elaborate words, in the Income Tax Act of 1917. A tax upon income accruing out of real or personal property is a tax upon such property

CONSTITUTIONAL LAW—Continued.

itself; and an income arising from labor is money, which is property, and hence a tax on such income is a tax on property. *Ib.*

22. ———: ———: **Prior Definition: Adoption.** Words and their context used in a prior constitution and construed by the highest court, when employed in a later constitution, are presumed to have been adopted with their adjudicated meaning, unless a contrary intention is manifest; and, hence, the word "property" used in the provision of the Constitution of 1875 which requires all property to be taxed in proportion to its value, having been used in similar sections of the two previous constitutions and having been construed by the Supreme Court not to include incomes, was used in the same sense and meaning in which, by judicial construction, it had been previously employed.

Held, by FARRIS, J., dissenting, with whom WOODSON, J., concurs, that the Constitution of 1865 contained no provision requiring taxes to "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," nor did it contain any provision conferring the power of taxation upon the Legislature, but assumed that such power was inherent; and while the Constitution of 1875 also assumed that the power of taxation was inherent in the Legislature, that power was carefully limited and restricted, among other things, by clauses (a) which required the tax to be uniform and (b) inhibiting the enactment of laws exempting any property from taxation except certain property specifically enumerated. *Ib.*

23. ———: ———: **Income as Intangible Property.** That income is property, and that a taxation of income from land or invested personalty is, in effect, a taxation of the thing producing the income, does not render a statute imposing a tax on incomes violative of the provision of the Constitution which declares that all property shall be taxed in proportion to value. Those considerations do not alter the fact that incomes are distinguishable from the tangible or intangible property yielding them.

Held, by FARRIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is not an intangible entity which the State may tax in a transmutation stage, after its production but pending its fixed investment in or transformation into some other sort of property. *Ib.*

24. ———: **Exemptions.** Since the limitations of the Constitution relating to *ad valorem* taxation upon property have reference solely to tangible and specific lands and personalty, the excluded classes of property embracing incomes are not within its regulative provisions specifying what property shall be exempt from taxation.

Held, by FARRIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that the Income Tax Act, which exempts from the tax incomes of unmarried persons to the extent of \$3,000 and of married persons to the extent of \$4,000, and imposes the tax upon all sums in excess of said amounts and on the entire income of business corporations, is violative of that clause of the Constitution which says that "all laws exempting property from taxation" other than property used exclusively for religious worship, schools or purposes purely charitable "shall be void," and, besides, in so doing, violates the other clause which says that taxes "shall be uniform upon the same class of subjects." *Ib.*

CONSTITUTIONAL LAW—Continued.

25. ———: **Uniformity: Classification: Graduation.** The Constitution does not prescribe uniformity of taxation as to any subject-matter of taxation except property in the constitutional sense, which does not embrace incomes. The provision of the Constitution which requires taxes to "be uniform upon the same class of subjects" recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. Since the Income Tax Act of 1917 classifies persons, corporations and entities, and provides a classification, as to amount, of the portion of the net income of each class of persons, corporations and entities which it makes subject to the tax, and further provides for the payment of an identical rate of taxation by each of the classes made subject to the burden, and requires each person, corporation or entity to pay the same tax which is to be paid by every other person, corporation or entity belonging to the class, it does not violate the constitutional rule of uniformity. The Legislature, by the express constitutional terms, had the power to create the classification of the distinct subjects contained in the act.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Income Tax Act is (a) a revenue measure purely; (b) the tax it imposes is not an occupation tax, because, while it taxes incomes derived from labor, trades, business and professions, it also taxes incomes from rents on land and interest from bonds, money loaned and all other income from either real or personal property; (c) it is not a license law, imposing a license tax, for no regulation or the exercise of the police power is involved; (d) it imposes a direct tax, in contradistinction to an indirect tax, because the tax is demandable and collectible from the identical person against whom it is levied; and (e) since income is property it is a direct property tax, or a direct tax upon property. Said act, therefore, violates the constitutional rule that taxes "shall be uniform upon the same class of subjects," because: (1) incomes of unmarried persons less in amount than \$3,000 are not by it taxed at all; (2) incomes of married persons less than \$4,000 in amount are not taxed at all; (3) incomes from realty and personalty are, in effect, taxed at the rate of 35 cents on each \$100 thereof; (4) incomes from labor and professions are taxed at the rate of 50 cents on the \$100 thereof; (5) incomes of business corporations are taxed on the total amounts thereof, without any exemption whatever; and (6) incomes from numerous alleged educational, fraternal, charitable, benevolent, agricultural and religious corporations and associations, not enumerated in the constitutional exemption list, are wholly exempt from the tax, and therefore (in which WILLIAMS, J., also concurs) these exemptions are violative of the clause of the Constitution which says that "all laws exempting property from taxation, other than the property above enumerated, shall be void," and the exemptions contravene the rule of uniformity prescribed by the Constitution. The word "uniform" used in the Constitution means "conforming to one rule, not varying or variable;" and whether an income tax is a property, or a license, or an occupation tax, the Constitution requires it to be uniform in its burdens upon the same class of subjects, that is to say, upon incomes; and no more permits a graduated tax on incomes than a graduated tax on property. *Ib.*

CONSTITUTIONAL LAW—Continued.

26. ———: ———: **In Excess of Property Taxes.** Section 32 of the Income Tax Law of 1917 is not unconstitutional because it creates a class consisting of persons whose income taxes exceed those paid on their real and personal property and imposes a tax on their incomes to the extent that their income taxation exceeds their property taxation. Persons belonging to such a class occupy a relation of support to the State reasonably distinguishable from others who pay taxes only on their income, and therefore such a classification does not contravene the constitutional requirement that taxes shall be uniform on the same class of subjects. [FARIS, WOODSON and WILLIAMS, JJ., dissenting.] *Ib.*
27. ———: ———: **U. S. Constitution.** The Income Tax Act of 1917 does not contravene the Fourteenth Amendment of the U. S. Constitution. The State has the freedom of a sovereign both as to the objects and methods of taxation. *Ib.*
28. **Unconstitutional Statute: Application.** A statute may be unconstitutional as to part of its subject-matter and valid in its application to other parts. *State v. Koontz*, 475.
29. **Constitutionality of Statute: Not Decided.** Where in the suit for taxes the defendant pleaded that the lots were exempted by the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes," and the plaintiff did not plead that such statute is unconstitutional, the court is not called upon to rule that such statute is violative of the provision of the Constitution which exempts property "of the State" and certain other property enumerated and declares that all laws exempting property other than that enumerated shall be void. *State ex rel. v. Fleming*, 509.
30. **Hospital Act: Purpose.** The Act of 1917 (Laws 1917, p. 145) authorizing counties to establish and maintain public hospitals, and to levy a tax and issue bonds therefor, has for its primary purpose, as shown by its terms, the providing for the construction of public county hospitals and the creation of a public debt for that purpose. The rate of taxes to be levied for the purpose of paying the debt was not the main purpose nor a vital element of the act. *State ex rel. v. Hackmann*, 534.
31. ———: **Tax Rate to Pay Debt: Self-Enforcing.** That part of the Constitution requiring a municipality, when creating a debt beyond the income and revenue of the current year, to "provide for the collection of an annual tax sufficient to pay interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years," is self-enforcing, and is effective without legislative action. *Ib.*
32. ———: ———: **Limited to Two Mills Tax.** So much of the County Hospital Act of 1917 as undertook to fix a maximum rate of two mills on the dollar-valuation of property as the tax to be levied to pay the bonds was a work of supererogation, since the Constitution itself requires "an annual tax sufficient" to pay the interest and principal of the debt within twenty years, which is as much a part of the act as if it had been written into it. If the rate of two mills on the dollar is sufficient then it is a valid rate; and if not sufficient, then the limitation to two mills is harmless, because the constitutional requirement *proprio vigore* was substituted for it. *Ib.*

CONSTITUTIONAL LAW—Continued.

33. ———: **Limitation of Tax Rate: Separate From Rest of Act.** Where some portions of a legislative act are invalid and, after they are separated from what is valid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted had it known that the excised portions were invalid, the act will be upheld. It is apparent from the terms of the County Hospital Act of 1917 that the Legislature would have enacted it had it contained no provision limiting the rate of taxation to pay the bonds to two mills on the dollar; and disregarding all its provisions relating to the rate of taxation, since the Constitution itself supplies them, a valid and complete act remains. *Ib.*
34. ———: **Anticipation of Revenue.** The County Hospital Act of 1917 was not enacted in pursuance of the powers or with reference to the objects specified in Section 11 of Article 10 of the Constitution, and hence it is not invalid as an attempt to authorize the issuance of bonds in anticipation of collection of increased rate of taxation. *Ib.*
35. **Fund Commissioners: Power to Contract: Necessary Incidents.** In view of the inhibition of the Constitution (Sec. 24, art. 4) that the General Assembly shall have no power "to pay or to authorize the payment of any claim hereafter created against the State . . . under any agreement or contract made without express authority of law," the power of the Board of Fund Commissioners to enter into a contract relating to the sale of the State's bonds must be strictly construed, and no such broad meaning of the word "necessity" as "convenient" and "proper" is to be tolerated; but as the board was given express authority to sell the Capitol bonds and power to enter into contracts, they were also given, as necessary to the exercise of such power, the further power to enter into an agreement with private citizens to submit to them a plan to sell the bonds; and as the Legislature in an appropriation act recites that such plan was submitted, the act appropriating money to pay for the service rendered is not without express authority of law.
- Held*, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that no appropriation act derives any operative force from its own terms alone, but something more, usually some statute, is necessary to authorize the withdrawal of money from the public treasury; and as the statute authorized the board to sell the bonds at the best advantage and required the proceeds to be applied exclusively to the building of a new capitol, furnishing the same and the acquirement of additional ground for a site, and the Constitution prohibits the Legislature to appropriate money in "payment of any claim . . . under any contract made without express authority of law," the Board of Fund Commissioners had no power to enter into a contract to pay for a plan to sell the bonds, and the General Assembly had no power to appropriate money to pay for a plan for their sale, voluntarily submitted by private persons and never accepted by the board, and no such power can be implied from the restricted language used, nor did any public necessity for the contract or the plan exist, and it is only when the public interest is involved that a necessity, as an incident to the power granted, can be said to exist. *State ex rel. Kelly v. Hackmann*, 636.
36. **Capitol Building Fund: Restricted Use.** The Capitol Building Fund having been increased from other sources than the pro-

CONSTITUTIONAL LAW—Continued.

ceeds of the Capitol bonds to an amount more than sufficient to discharge the obligation of a contract for a plan for selling the bonds, it cannot be held, as a fact, that an appropriation to pay said obligation is a diversion of the proceeds of the bonds, whose proceeds were by statute devoted to erecting a capitol, furnishing it and buying additional ground for a site; nor can it be held, as a matter of law, that the use of the proceeds to pay said obligation would be a diversion of them, since such payment was a necessary expense of floating the loan and therefore not an unlawful use of the proceeds. [WALKER, J., BOND, C. J., and WOODSON, J., dissenting.] *State ex rel. Kelly v. Hackmann*, 636.

37. **Grant of Money to an Individual: Constitutional Inhibition.** The restriction of Section 46 of Article 4 of the Constitution inhibiting the Legislature from granting public money to an individual, is laid upon gratuitous grants. It does not prohibit payment for services rendered the State; for instance, it does not prohibit the Legislature to appropriate money to pay private citizens for a plan submitted to the Board of Fund Commissioners to sell a large issue of bonds. *Ib.*
38. ———: **Certification of Claim.** The State Capitol Commission was not entrusted with the sale of Capitol bonds, nor did it have anything to do with claims or demands incident to their sale, and consequently it was not necessary that it allow or certify a claim by private persons for a plan to sell the bonds submitted to the Board of Fund Commissioners. *Ib.*
39. **Habeas Corpus: Not of Legislative Creation.** Relief from illegal imprisonment by *habeas corpus* is not the creature of any statute. The writ cannot be abrogated by the Legislature. The Constitution (Art. 2, sec. 26) provides that its privileges shall never be suspended. The Legislature has confined its action principally to facilitating the use of the writ, and the courts cooperate with it in extending these facilities. *In re Webers*, 677.

CONTRACTS.

1. **Public Service Commission: Power to Fix Telephone Rates.** The Public Service Commission has power by order to fix telephone charges at rates exceeding maximums prescribed in a franchise granted by a city ordinance to a telephone company prior to the enactment of the Public Service Act of 1913. Such an order does not impair the obligation of contracts evidenced by such ordinance. [Overruling *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, so far as conflictive.] *City of Fulton v. Pub. Serv. Com.*, 67.
2. ———: **Impairment of Individual Contracts: Police Power.** All contracts made for individual subscribers by the city with a public service telephone company, through the medium of ordinances, are made in contemplation of the State's power to fix rates. Individuals cannot abridge the police power, but all such contracts are made subject to revision by an exercise of that power by the State, and its exercise does not impair the obligations of such individual subscribers. *Ib.*
3. **Railroads: Signal Crossings and Gates: Do Not Include Interlocking Plant.** A contract made by a railroad company which was about to construct its tracks across those of an existing railroad belonging to another company, by which the junior company agreed to pay the entire costs of "crossing-signals or gates" thereafter at

CONTRACTS—Continued.

any time necessary to be erected and maintained, is not an agreement to pay the costs of erecting an "interlocking plant" at the crossing, since the words "crossing signals or gates" do not include an "interlocking plant;" and hence an order of the Public Service Commission, made upon the petition of the junior company, directing the installation of an interlocking plant and requiring the older company to pay a part of the cost, does not impair the obligation of such contract. *State ex rel. C. & A. Ry. Co. v. Pub. Serv. Com.*, 72.

4. **Life Insurance: Fraudulent Contract.** A policy of life insurance, issued upon an application made by one who personated the applicant, having been conceived in fraud, may, for that reason, in an action on the policy, be shown to be fraudulent and therefore invalid. *Carter v. Ins. Co.*, 84.
5. **Franchise Ordinance.** The passage of an ordinance by the council of a city of the third class and its acceptance by a water company, by which it is provided that the rent on city hydrants shall be a named sum per year, constitute a contract between the city and company, whether or not the ordinance is submitted to a vote of the people. *State ex rel. v. Pub. Serv. Com.*, 201.
6. **Water Rate: In Excess of Ordinance Rate: Power of Public Service Commission.** The Public Service Commission of Missouri has the lawful right to fix the rate for hydrant water, so far as the city is concerned, in excess of the rate fixed by an existing ordinance. *Ib.*
7. **Police Power: Abridgment: Nullifying Existing Contracts.** The State of Missouri cannot divest itself of the right to exercise its police power. The Constitution declares that "the exercise of the police power of the State shall never be abridged," and such power cannot be contracted away, nor can the Legislature authorize a municipal corporation to contract it away. A statute which authorizes a city to contract for water service to the city and the general public may be so modified as to delegate to a legislative agent the power to fix rates different from those mentioned in such contract for the Legislature cannot authorize a municipal corporation and a public service corporation to make a contract which will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract. *Ib.*
8. **Public Service Utility: Rate: Commission Rate.** Where a public service corporation by written contract agreed to supply electric energy to a private manufacturing company for a designated length of time at designated rates, higher rates subsequently fixed by the State Public Service Commission by the adoption of a schedule of rates applicable for all service of the kind furnished by the public utility, if reasonable, supersede such contract rates, and the manufacturing company is not entitled to an injunction restraining the public service corporation from discontinuing the service upon a refusal to pay such higher rates. *Bolt & Nut Co. v. Light & Power Co.*, 529.
9. ———: ———: **Police Power.** The power to fix the price at which a public utility corporation is to furnish electricity to the public arises from the police power of the State, which under the Constitution cannot be abridged by contract between the corporation and private citizens; and where the Legislature has by statute designated the Public Service Commission as the instrumentality to exercise such rate-making power, and it in conformity with the statute fixes a schedule of reasonable rates for public service within

CONTRACTS—Continued.

the bounds of a city, its rates automatically supersede all contract rates coming in conflict with them. *Bolt & Nut Co. v. Light & Power Co.*, 529.

10. **Contract With State: Proof of Existence: Finding by Legislature.** A finding by the Legislature of a fact upon which the right to enact a law depends is not to be further inquired into by the courts. So where an appropriation act appropriated a definite sum of money to private persons "in full payment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds," and a contract for such a plan could under the statute have been made on behalf of the State with said board, it will be taken as true that an agreement was made between said persons and said board, under which the claim arose. And even if the court were to reserve the right to make an independent finding on the question of fact on the ground that the constitutionality of the act depends on a question of fact, the prior finding of the Legislature that such fact did exist would be treated as *prima facie* true.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that the plan alleged to have been submitted was rendered voluntarily, with no implied or express obligation on the part of the board to pay therefor, if the services tendered were not accepted, and the Constitution prohibits the Legislature to appropriate money for a mere submitted plan. *State ex rel. v. Hackmann*, 636.

11. —: **Presumption of Validity: Judicial Question.** The courts will presume that the Legislature passed upon the validity of an agreement made by the board which was empowered to make it on behalf of the State, before it appropriated money to pay the obligation which it expressed, unless it is deemed a clear violation of the Constitution; but, nevertheless, the validity of the agreement is a judicial question, and the act making the appropriation to pay the claim will not be upheld if the agreement is one that the Constitution makes null and void. *Ib.*

12. —: **Fund Commissioners: Power to Contract.** Section 11900, Revised Statutes 1909, which authorized and empowered the Board of Fund Commissioners "to enter into contracts, and to refund any part of the bonded indebtedness of the State," when read in connection with Section 11890, which authorized them to "perform all such acts and things as may be required of them by law," and the amendments of 1913, to Section 11900, which "authorized and empowered" said board "to enter into contracts and to refund," did not restrict their duties to refunding bonds, but authorized them to make contracts for the sale of Capitol bonds authorized by the Act of March 16, 1911.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that neither said statutes nor any other invested the board with authority to contract to pay for a plan to sell bonds voluntarily submitted to it and never accepted. *Ib.*

13. **Survey: Arbiters: Separate Report: Umpire.** A stipulation between two adjoining claimants to a parcel of land that the dividing line between their respective tracts should be ascertained by two surveyors, one to be chosen by each, and that if they could not agree a third, named in the stipulation, "shall decide all matters of difference between said two surveyors," did not require that the three should act together and join in one report, but the third could accept the parts of the line agreed upon by the two and proceed to survey the part not agreed upon by them, and file a

CONTRACTS—Continued.

separate report setting forth his finding. The stipulation did not require that there be one report concurred in by a majority, nor did it require that the third act jointly with the other two. *White v. Herminghausen*, 687.

14. ———: ———: ———: **Understanding of Parties.** Where there is any ambiguity as to the meaning of a stipulation, what the parties did under it, without objection, with the full knowledge of each other, indicates its meaning. *Ib.*

CONVEYANCES.

1. **Patent: Notice: Recorded in County.** It is not necessary that the patent, which named a certain person as patentee and described him as the assignee of certain military bounty warrants, should be recorded in the county where the land lies, in order to impart notice to the tax collector that such patentee or his heirs are the owners of the land. The Act of Congress required the patents to be recorded in the General Land Office, and when so recorded they imparted notice to the tax collector that the said certificate holder had assigned his land warrants to the patentee. *Bell v. George*, 17.
2. **Equitable Title: Entries Prior to Patents: Issued After Suit Brought.** Entry vests the equitable title in the entryman, and such title is sufficient to support a suit to quiet title; and where patents issued after the suit was brought are not in the record, it will be assumed on appeal, in aid of the judgment based on them, that they were issued on entries properly made prior to the institution of the suit. *Miller v. Bufton*, 35.
3. **Street and Lots: Plats and Measurements: Conflict.** By Section 6573, Revised Statutes 1879, the platting of ground had the same legal effect to dedicate to public use the streets and alleys therein described as would a conveyance directly to the city; and when the owners of the lots and blocks fronting on said streets and alleys as shown by the plat sell them to third parties, the title to the streets and alleys cannot be questioned by the city or by the purchasers of other lots, nor can the rights of the purchasers of lots to access to the streets and alleys as shown by the plat be questioned by the purchasers of other lots embraced within the plat. [Following *Laddonia v. Day*, 265 Mo. 383.] *Wright v. City of Joplin*, 212.
4. ———: ———: ———: **Plat Determinative.** When the plat of an addition has been executed and filed in conformity with the statute, the streets and alleys indicated by the plat as actually fitted to and laid out on the land, and not as indicated by calls of measurements, courses and distances as shown by field notes of the surveyor, became vested absolutely in the city for the use of the public. If there is a conflict between said plat and the measurements of a survey—if the plat designated certain streets and they were actually laid off on the surface of the ground by the dedicators as indicated and as subsequently used by the public, and lots were sold and improved in conformity to stakes and boundary lines, which also were in conformity to the plat, although the field notes attached to and filed with the plat described the tract as 1320 feet square, when as shown by the plat the tract was 1325 feet east and west, and as shown by a subsequent survey was 1300 feet on the north line thereof and 1299.7 feet on the south line—the plat must prevail, and the city cannot change the lot lines as shown by it, nor re-establish the streets

CONVEYANCES—Continued.

- and alleys in accordance with the actual measurements. *Ib.*
5. **Deed to Husband and Wife: Title in Survivor.** The owner of land and his wife conveyed his land to their daughter, and the daughter by another deed conveyed it to her father and mother. *Held*, that the last deed created an estate by the entirety in the father and mother, and upon the father's death the entire legal fee simple estate remained in the mother. *Burke v. Murphy*, 397.
 6. **Intended as Mortgage: Presumption: Character of Proof.** The presumption of law is that a warranty deed regular in form is not a mortgage, but was intended to be what it purports to be, and it will not be decreed to be a mortgage unless the presumption is overcome by clear and convincing proof. *Ib.*
 7. ———: **No Debt.** A conveyance cannot be held to be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of an existing or future obligation. *Ib.*
 8. ———: **Bond for Support.** A deed from the owner of land to his daughter will not be decreed to be a mortgage, when construed in conjunction with a bond of even date executed by the daughter by which she obligated herself to support her father and mother during their lives and to permit them to remain upon and use the land as a home, and to pay \$1,500 in case she defaulted in the performance of the obligation. There was no debt or obligation from the grantor to the grantee. *Ib.*
 9. **Fraudulent: Raised by Party Without Interest.** The point that a deed was fraudulently procured by the grantees cannot be raised by persons who will in no wise be benefited if the deed is set aside. Where a valid warranty deed was made by a daughter to her father and mother, the children of the said father by a former marriage cannot raise the point that a deed by the surviving widow to her said daughter was fraudulently procured, since if it were set aside the title would not pass to them, but to the heirs of the grantor. *Ib.*
 10. **Condition: Occupation by Negroes.** Where the deed contained a condition that the property "shall not be sold, leased or rented to negroes," a breach is shown if a part of the building on the lot was leased to negroes, the intention of the restriction being to prevent negroes from coming on the premises as tenants; and the deeds must be interpreted in accordance with the manifest intention, as gathered from them as a whole. *Koehler v. Rowland*, 573.
 11. ———: **Restrictive Sale or Use: Forfeiture.** Forfeiture is a harsh remedy and where a stipulation in a deed can be construed as a mere restrictive covenant and not a condition, so as to avoid a forfeiture, it will be so construed; and the question is to be determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object in view; but where the language is unmistakable, particularly where there is a provision for re-entry upon a breach of the condition of where the right to re-enter is plainly implied, it is a forfeiture. *Ib.*
 12. ———: **Sale or Lease to Negroes: Forfeiture.** The deed contained a condition that the "above described property shall not be sold, leased or rented to any negroes for twenty-five years from date hereof, and in event of such transfer, lease or rental before the expiration of said term, said property shall revert to grantor or

CONVEYANCES—Continued.

sellors without process of law or equity." *Held*, to provide, in perfectly clear language, for a forfeiture on breach of condition and for a re-entry; and if not clearly expressed, forfeiture is implied in the language used. Such condition does not come within the rule prohibiting restraints upon alienation. *Ib*.

13. ———: ———: **Restraint Upon Alienation.** It is within the right and power of a grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. *Ib*.
14. ———: ———: **Public Policy.** A condition in a deed that the property is not to be "sold, leased or rented to negroes for twenty-five years" is not void as against public policy. The purpose of the restriction being to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes, it comes within the rule that conditions in deeds which prohibit the use of property for certain purposes, in order that it may become more desirable as places of residences for families, are valid. *Ib*.
15. ———: ———: **Perpetuities.** A stipulation in a deed whereby the title is to revert to the grantor upon entry for breach of a condition subsequent, is not within the rule against perpetuities. The courts will not refuse to enforce a forfeiture for a breach of a condition in a deed that the property was not to be "sold, leased or rented to negroes for twenty-five years from date," on the ground that the condition violates the rule against perpetuities, although the event upon which forfeiture might be declared might occur after every one in interest was dead and more than twenty-one years and ten months thereafter had elapsed. *Ib*.
16. ———: ———: **Change in Conditions: Question of Fact.** If the purpose of a condition in a deed declaring that the property "shall not be sold, leased or rented to negroes" can no longer be accomplished, owing to changed circumstances, such as the growth of the city and the present use by negroes of the whole neighborhood, and it would be oppressive and inequitable to give effect to such condition. It will not be enforced; but where the evidence as to such changed circumstances is conflicting, the appellate court will accept the finding of the trial court that there had been no such change, as conclusive in a law case, and will not refuse to enforce the condition on such ground. *Ib*.

CONVICT.

Sale of Land for Taxes: Void Judgment. A judgment for taxes obtained against an owner of land incarcerated in the Penitentiary is void and a sale under execution does not affect the legal title. The statute specifically declares that a convict "shall be deemed civilly dead" during the term of his sentence, but it also says he "is and shall be under the protection of the law" and provides for the appointment of a trustee to "prosecute and defend all actions commenced by or against the convict;" and if the State, instead of pursuing the course thus provided by the statute, proceeds against him directly for the taxes due from his land at a time when he cannot be haled into court, the judgment does not affect the legal title. *Murphy v. Barron*, 282.

CORPORATIONS

1. **Garnishment: Voluntary Transfer of Assets: Fraudulent Conveyance.** Even if defendant corporation was at the time indebted to plaintiff, as made manifest by subsequent suit, though no claim had previously been made, a voluntary transfer of negotiable bonds and notes in the form of dividends to stockholders, is not presumptively fraudulent in law nor voidable, if defendant owed nothing except plaintiff's claim and retained sufficient property to pay said claim. *Saunders v. Hackley & Hume Co.*, 41.
2. ———: **Burden of Proof.** The burden rests upon the interpleading stockholders of defendant corporation to prove that, at the time of the voluntary transfer to them, as dividends, of negotiable bonds and notes payable to defendant, the defendant retained sufficient assets to pay plaintiff's claim; but having established that fact by showing that defendant still owns property far in excess of plaintiff's claim and that there was no actual fraud, the writs of garnishment must be dismissed. *Ib.*
3. **Foreign: Supervision by Domestic Courts.** A court of equity, by statute and independently of the statute, has power to exercise a supervisory control over a foreign corporation, whose chief office, principal place of business and tangible property are in this State and whose directors and other officers reside here, and at the request of its stockholders, showing fraud, deceit and waste by its managers and directors, to entertain a bill asking for an accounting and the appointment of a receiver. [Distinguishing *State ex rel. Life Ins. Co. v. Denton*, 229 Mo. 187, and *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78.] *State ex rel. v. Reynolds*, 113.
4. **Accounting: Profit on Company Stock.** An allegation in the petition of stockholders against the president and directors of a corporation that the president bought 300 shares of its stock from a stockholder at \$40 a share for the use of the company and sold it at \$60 per share, at a profit of \$2000 to himself, states a specific and sufficient ground for an accounting. *Ib.*
5. ———: ———: **False Entry on Books.** A charge by a stockholder in his petition that the president and directors purchased certain articles for the corporation at \$17,000 and then caused entries to be made on the books showing an expenditure of \$22,000 on that account, will authorize an accounting. *Ib.*
6. ———: **Removal of President of Corporation.** A bill by a stockholder which seeks to have the president of the corporation removed on the ground that he draws an exorbitant salary, stating facts which tend to show that his salary is exorbitant, is not demurrable. *Ib.*
7. **Public Utility: Corporate Powers: Ultra Vires.** In determining whether or not a corporation is a public utility, the important thing is not what its charter says it may do, but what it actually does. If the things it does constitute it a public utility, it will not be heard to say that those things are *ultra vires* of its charter powers, or to urge its own wrongful aggressions to escape its obligations to render the public service. *State ex rel. Danciger v. Pub. Serv. Com.*, 483.

COSTS.

1. **In Action for Damages.** Even though the petition in an action for damages contains two counts and the court gives a peremptory instruction to find for defendant on the first count,

COSTS—Continued.

if the verdict and judgment are for plaintiff on the second count, it is the duty of the clerk to tax all the costs against defendant, for the statute (Sec. 2268, R. S. 1909) says that "in all actions not founded on contract, if the plaintiff recover any damages he shall recover his costs." The costs being so taxed, a motion to retax them implies a subsequent judicial investigation and determination by the court. *Burton v. Railroad*, 185.

2. ———: **Retaxed at Subsequent Term.** The clerk having upon the return of a verdict for damages for plaintiff upon one count of his petition in an action *ex delicto*, entered a judgment in which he taxed all the costs against defendant, as the statute required, a motion to retax costs filed by defendant at a subsequent term was too late, and the court had no jurisdiction to entertain it. The motion to retax must be filed at the term at which the judgment was entered. *Ib.*

COUNTY HOSPITAL ACT. See *Taxes and Taxation*, 29-33.

COUNTY TREASURER.

1. **Judgment: Entirety.** There can be but one final judgment and it must dispose of all parties; but the common-law rule that judgments are entireties is effective only in exceptional cases. *State ex rel. v. Blakemore*, 695.
2. ———: ———: **Suit on Bond: Corrected as to Non-Liable Defendants.** Suit was brought by the county against a defaulting treasurer and his bondsmen. Two of the defendants, sued as heirs of a deceased surety, proved that said surety died before suit was brought on the bond, that his estate had been finally settled in the probate court before the trial of the case and that no claim against the estate was made by the State or county, and they asked the court to direct a verdict in their favor, which request was refused. After verdict they moved for a new trial, whereupon the court set the verdict aside as to them, and rendered judgment in their favor and against the other defendants. *Held*, that the county might have sued any or all of the sureties, since their liability was both joint and several, and judgment against those shown to be liable was proper, and it being conceded that said heirs were not liable the judgment is not to be reversed because the trial court sustained their motion for a new trial. *Ib.*
3. **Bond: Drainage District Funds: Common Law Liability.** The bond of a county treasurer, whose terms clearly include all county funds except school funds, the statute clearly requiring him to give bond for all moneys that shall from time to time come into his hands from any drainage district in the county, covers drainage district funds; and if not good as a statutory bond, because not conditioned exactly as prescribed by the statutes, is nevertheless good as a common-law bond, and covers drainage funds of districts organized after it was executed. *Ib.*
4. ———: ———: **Interest.** By force of the statute (Sec. 3771, R. S. 1909) the county treasurer and his sureties are liable for interest on all moneys belonging to the county appropriated by him, from the day he went out of office, at least, and not simply from the time suit was brought. *Ib.*
5. ———: ———: **Application of Payments.** Where the county treasurer did not deposit the funds in his hands separately, but mingled them all in depositing them, the trial court did not err

COUNTY TREASURER—Continued.

in instructing the jury, in a suit on his bond, that if he was indebted to the county and paid it a less sum than the total due and made no application of the payment to particular funds, the county had the right to apply the payment as it deemed best, and the bringing of the suit upon the bond "is evidence which will authorize you to find there was an application of the payment to his indebtedness, if any, to all funds other than those covered by the bond sued on," no question having been raised by the sureties at the trial as to whether the county court ordered the suit brought. If the treasurer failed to direct the application of the fund, the county had the right to do so; and the bringing of the suit on the bond for the whole deficiency would have bound the county, as an application of payment, in any other proceeding, and was substantial evidence of the county's intention to make the application to the funds mentioned in the instruction. *State ex rel. v. Blakemore*, 695.

6. ———: ———: **Commingleing of Funds: Estoppel.** In a suit on a county treasurer's bond it was not error to instruct the jury that if he failed to pay over a balance he owed, and if he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, "then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on," although estoppel was not pleaded, there being ample evidence of the facts predicated in the instruction. Whatever estops the principal usually estops the surety; and where he testified that he had mingled the funds and if there was any shortage it was impossible for him to tell where it was, neither he nor his sureties can profit by his wrong. *Ib.*
7. ———: ———: **Good Character.** Evidence of a county treasurer's good character is not admissible in a suit on his bond to recover the amount of county funds appropriated to his own use. *Ib.*
8. **Evidence: Specific Objection.** Appellants cannot be heard to contend that certain evidence offered by them for a specific purpose and rejected was competent for other purposes. *Ib.*

COURTS.

1. **Jurisdiction: Courts of Appeals: In Original Proceedings.** Where relief is sought other than in the recovery of a monetary judgment, the value of the right involved, estimated in money, constitutes the measure of jurisdiction of the appellate court to hear and determine an original writ. Jurisdiction of a court of appeals in prohibition and other original proceedings should be brought as nearly as possible into harmony with its appellate jurisdiction. A court of appeals is not authorized to issue such writs, or to exercise superintending control over inferior courts, in cases in which the Supreme Court has jurisdiction by appeal or writ of error. *State ex rel. v. Reynolds*, 113.
- B. ———: ———: ———: **Suit Against Corporation for Accounting, Etc.** Suit was brought by two stockholders, the par value of whose stock was \$8300, against the directors of a corporation, whose tangible property was \$25,000, charging deceit, fraud and waste in its management, and praying for an accounting and the appointment of a receiver. *Held*, that the Court of Appeals had no jurisdiction of a writ of prohibition to prevent the circuit judge from hearing and determining the bill in equity. *Ib.*
- 3 **Foreign Corporation: Supervision by Domestic Courts.** A court of equity, by statute and independently of the statute, has

COURTS—Continued.

power to exercise a supervisory control over a foreign corporation, whose chief office, principal place of business and tangible property are in this State and whose directors and other officers reside here, and at the request of its stockholders, showing fraud, deceit and waste by its managers and directors, to entertain a bill asking for an accounting and the appointment of a receiver. [Distinguishing *State ex rel. Life Ins. Co. v. Denton*, 229 Mo. 187, and *State ex rel. Hartford Life Ins. Co. v. Shain*, 245 Mo. 78.] *Ib.*

4. **Jurisdiction: Lewis County: Circuit Court at Canton.** In view of the previous decisions of this court it is held that the circuit court at Monticello has original jurisdiction of a suit to set aside a deed to land lying "east of the range line between ranges 6 and 7." *Barber v. Nunn*, 565.

CRIMINAL LAW.

1. **Intoxicating Liquor: Delivery by Purchaser's Agent.** Section 2 of the Act of 1907 (Sec. 7227, R. S. 1909) made unlawful the transfer of the possession of intoxicating liquor from one person to another, in a Local Option county, when by the act of transfer there was no change of ownership. That section made the delivery to the purchaser by the purchaser's own agent a violation of its provisions. *State v. Koontz*, 475.
2. ———: ———: **Direct Delivery to Purchaser by Carrier.** Section 7228, Revised Statutes 1909, is an exception to the operation of Section 7227, and relieves of its unlawful character the delivery of intoxicating liquor by one person to another in a Local Option county, where the deal, or order, is direct between the seller outside and the purchaser inside such county, and where the agency of no person who would profit by the traffic except as a common carrier intervenes between such seller and purchaser. *Ib.*
3. **Seduction: Corroboration.** While it is not necessary, in a prosecution for seduction, that there shall be two witnesses to sustain the charge, nor need the corroborative evidence be tantamount to another witness, it must be sufficient to counterbalance the testimony of the accused and thus remove the legal presumption of his innocence. *State v. Stemmons*, 544.
4. ———: ———: **Promise of Marriage.** In a prosecution for seduction corroborative testimony is required only as to the promise of marriage, and may consist of circumstances, but must come from others than the prosecutrix. It may consist of evidence of such conduct on the part of the parties as usually accompanies a promise of marriage, or admissions of the defendant, or continued attentions by him to prosecutrix, covering a long time, including frequent visits, during which she kept no other company, and proof of preparations for marriage made by prosecutrix following a continuous courtship is competent. *Ib.*
5. ———: **Promise of Marriage: When Made.** In a prosecution for seduction it is not necessary that the promise of marriage be made immediately preceding the intercourse; all that is necessary to show is that if made then or previously defendant thereby accomplished prosecutrix's seduction. *Ib.*
6. ———: **Proof That Prosecutrix Was Unmarried.** It is essential in a seduction case that it be made to appear by evidence that prosecutrix was unmarried; but such status may be shown by facts and circumstances. So where prosecutrix testified that

CRIMINAL LAW—Continued.

she had never had sexual intercourse with any one except defendant, that he told her that if she got into trouble on account of her relations with him he would marry her at once, she bore her parent's name, was questioned throughout the trial as "Miss," was referred to as "this girl," and the details of her manner and place of living and of her associations with defendant indicated an unmarried status, the evidence was sufficient to support a finding that she was unmarried, although there was no affirmative statement by any witness that she was unmarried. *State v. Stemmons*, 544.

7. ———: **Barter for Promise.** The forceful facts of this case, showing the bringing into play by defendant of the arts and blandishments of the seducer, leave nothing on which to base a contention that, instead of being seduced within the meaning of the statute, prosecutrix bartered away her virtue in exchange for a promise of marriage. *Ib.*
8. ———: **Instruction: Argumentative: Comment on Evidence: Attributing Pregnancy to Betrayal.** An instruction which is argumentative in form, and an improper comment on the testimony of prosecutrix, should be refused; and an instruction in a seduction case, which tells the jury that they should "scrutinize the testimony of the prosecutrix very closely, for the law assumes that a woman, finding herself pregnant, has the most potent motives to assert her condition was brought about by a promise of marriage, for very obvious reasons: she must excuse the act to her family, to her friends and to society, and every consideration would impel her to attribute it to deception and betrayal," is such an instruction. *Ib.*
9. ———: ———: **Corroboration of Promise: Preparations for Marriage.** There being positive testimony by others than prosecutrix that after the promise she had made preparations for marriage, and defendant having made no effort to show that they were not made nor to question their good faith, the trial court did not err in giving an instruction authorizing the jury to consider the preparations she had made for housekeeping as one of the corroborating circumstances of the promise of marriage, "although it has not been shown that defendant had knowledge of such preparations." *Ib.*

CUSTOM.

1. **Contrary to Ordinance.** Custom is no defense to a violation of positive law. Where plaintiff was injured by falling as she attempted to leave her seat in a moving-picture theater, whose aisle was four inches below the auditorium floor, and which construction was in violation of a city ordinance, it was not error to instruct the jury that the fact that the owners of other theaters permitted similar inequalities in the floor constituted no defense. *Oakley v. Richards*, 266.
2. **Proof.** Evidence that about one out of ten theaters in the city had steps from the auditorium floor to the aisle does not prove a customary construction. *Ib.*

DAMAGES.

1. **Intoxicated Passenger: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 433, (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicat-

DAMAGES—Continued.

ing liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the names of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitutions. *Lige v. Railroad*, 249.

2. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The Act of 1909, page 438 (Secs. 4710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United States which prohibit the enforcement of any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States. *Ib.*
3. ———: ———: **Common Law Right of Action Nevertheless.** Notwithstanding the fact that the statute upon which plaintiff grounds his cause of action for personal injuries is unconstitutional, yet if the petition, independent of that plea, states a good cause of action at common law, a demurrer to the evidence should not be sustained, if it warrants a submission of the case to the jury upon the common-law theory. *Ib.*
4. ———: **Injury to Fellow Passenger: Liability of Carrier.** A common carrier is bound to exercise the utmost practicable care for the safety of its passengers, to safely transport them, and to protect them while in transit from violence and insults from all persons on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damages therefor; but the duty does not amount to an absolute guaranty that a passenger will be transported with absolute safety or that he will not be insulted or injured by an intoxicated fellow-passenger. The rule means that the conductor and other trainmen must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for injuries inflicted by one passenger upon another, if in the exercise of that degree of care the assault or injury is not to be foreseen. *Ib.*
5. ———: ———: **Sudden and Unexpected Assault.** A common carrier is not liable in damages to a passenger for injuries resulting from a sudden assault by another intoxicated passenger, who, without any previous threat or verbal altercation, who was not previously boisterous or insulting in his talk or conduct and who gave no evidence that he was intoxicated except that he was talking generally and having a jolly good-time, suddenly seized

DAMAGES—Continued.

- an iron wrench and struck on the head the other passenger, who was a total stranger to him. *Lige v. Railroad*, 249.
6. **Moving Picture Theater: Duty of Owner to Patrons.** It is the duty of the owners and operators of a moving-picture theater to see that the place to which they invite their patrons is reasonably safe for use for the purposes for which it was designed. *Oakley v. Richards*, 266.
 7. ———: **Step-Off in Floor: Absence of Light.** It is a matter of common knowledge that a four-inch depression in a floor is sufficient to cause one to fall who, in the absence of light and knowledge of the depression, steps into or upon the edge of it. So that where the floor upon which were the seats of the moving picture theater was four inches above the aisle, which fact plaintiff did not know, and there was not sufficient light to enable her to see the depression, which brought about her fall, the concurrence of the two constituted negligence, and the jury was warranted in finding that her fall was due to her inability to see the step-off on account of the darkness. *Ib.*
 8. ———: ———: **Contributory Negligence.** Patrons having been invited to enter and leave the moving-picture theater at will during performances, it cannot be said, as a matter of law, that a patron, seeing others using the aisle, which was four inches below the floor on which the seats rested, was guilty of contributory negligence in falling, in the absence of knowledge of the step-off and of sufficient light to enable her to see it, to apprehend that the usual path of exit contained an unsafe place or pitfall. The question was one for the jury. *Ib.*
 9. ———: **Floor Level: Inequalities Upon Permission: Inspection.** Where the ordinance declared that "no steps shall be permitted in any aisle or in any part of the auditorium floor" of a theater "except by written permission" of named officials, permission cannot be implied from a mere inspection by such officials. *Ib.*
 10. ———: **Validity of Ordinance: Steps in Aisle: Permission of Officials.** An ordinance prohibiting steps in the aisle or on any part of the auditorium floor of a moving-picture theater "except by written permission" of designated officials does not vest an arbitrary power in said officials and is not for that reason invalid. In case a city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from a designated official; and a city may lawfully prohibit absolutely inequalities in floor levels in darkened theaters, and matters of detail in enforcing ordinances otherwise valid may be left to designated officials. *Ib.*
 11. ———: ———: **Assumption of Risks.** Where the petition charged that the aisle of a moving-picture theater was four inches lower than that part of the floor on which the seats rested, that such step-off was in violation of a designated ordinance, that such construction was negligence, that plaintiff had no knowledge of such step-off and that there was not sufficient light to enable her to see it, an instruction on the assumption of risks which ignores such allegations is properly refused. *Ib.*
 12. ———: ———: **Custom: Contrary to Ordinance.** Custom is no defense to a violation of positive law. Where plaintiff was injured by falling as she attempted to leave her seat in a moving-picture theater, whose aisle was four inches below the auditorium floor,

DAMAGES—Continued.

- and which construction was in violation of a city ordinance, it was not error to instruct the jury that the fact that the owners of other theaters permitted similar inequalities in the floor constituted no defense. *Ib.*
13. ———: ———: ———: **Proof.** Evidence that about one out of ten theaters in the city had steps from the auditorium floor to the aisle does not prove a customary construction. *Ib.*
 14. **Theaters: Difference in Floor Levels: Practicable Construction: Expert Testimony.** It was not error to permit an expert to testify that it was practicable to overcome differences in floor levels in theaters by gradients and inclined planes. It cannot be said as a matter of law that such methods of construction are so practicable that a jury are as capable of drawing correct conclusions on the subject as is an expert. *Ib.*
 15. **Surface Water: Protection: Condemnation.** Overflow water from a stream is surface water, and the owner of land has the right by constructing embankments to shut off such surface water from his land without being liable in damages to the owner of another tract for the injury thus done. But that rule does not relieve a drainage district from responding in damages done to land between its levee and such stream by increasing the overflow of water on such land, for the drainage district does not own land or a right of way, but in seeking to condemn a right of way for its levee through the land of such owner must comply with the constitutional mandate declaring that "private property shall not be taken or damaged for public use without just compensation." *Drainage District v. Ham*, 384.
 16. ———: **Levee Through Owner's Land: Increased Overflow.** The ex-ceptors owned 118.95 acres of land bounded by a river. The drainage district took 8.1 acres of the tract for the right of way of its levee, and the levee was so constructed as to leave 30.95 acres of the tract outside of the levee and between it and the river. *Held*, that, as the drainage district did not leave all of exceptors' land between the levee and the river, but appropriated a part of it for the levee right of way, it was liable in damages for the increased overflow of the river waters on the 30.95 acres, under that provision of the Constitution that says that "private property shall not be taken or damaged for public use without just compensation," and cannot escape the payment of such damages on the theory that the owner of lands has the right to shut off surface water from his lands without being liable in damages to another owner for the injury thus caused, for the drainage district is not the owner of any land, but is seeking to condemn a right of way for a levee through, and not outside of, exceptors' lands. [*Distinguishing Jackson v. United States*, 230 U. S. 1, and *Hughes v. United States*, 230 U. S. 24.] *Ib.*
 17. **Negligence: Federal Court Rule.** In cases coming within the purview of the Federal Employers' Liability Act, it is in harmony with the purposes of the statute to adopt the measure of damages sanctioned by the Federal courts, which it that no limitation is placed by the statute on the amount that may be recovered, except that of the damages actually sustained. *Laughlin v. Railway*, 459.
 18. ———: **Measure of Damages: Other Cases as Guide.** On account of the difference in the facts, there can be no hard-and-fast rule for the measure of damages in a personal injury case. A similarity in the awards in cases of like injuries may serve as a general

DAMAGES—Continued.

guide, but it furnishes no exact rule by which the damages may be estimated in a given case. *Laughlin v. Railway*, 459.

19. **Public Road: Jury Trial: After Appeal.** Upon an appeal from the judgment of the county court "in ordering the establishment of a public road," the appellants are not entitled to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land, or to have the question of damages considered at all. An appeal from the judgment of the county court opening or establishing the road, and from that order alone, does not give the circuit court jurisdiction to try *de novo* the question of damages adjudged by separate judgments in the county court. In *Matter of Critzer*, 514.
20. ———: ———: **No Request for Jury Trial.** If appellants made no attempt in the circuit court to have a retrial of the question of damages, they cannot be heard to complain in the Supreme Court that they were denied a jury trial on that question. *Ib.*

DEBTOR AND CREDITOR.

1. **Accord and Satisfaction: Part Payment: Receipt in Full: Consideration: Doubt as to Amount Due.** A part payment of a debt unquestionably due will not discharge the entire debt, even though receipted in full and based upon an understanding or agreement that it is payment in full, for there is no consideration to support the agreement. But where there is an honest doubt between the parties as to the amount due, and after due consideration the creditor yields to the debtor's views and accepts what the debtor concedes to be due and gives a receipt in full, and there is no fraud or other ground for equitable relief, the settlement is binding for the reason that it comes within the principle of accord and satisfaction. *Zinke v. Maccabees*, 660.
2. ———: ———: **Consideration: Receipt Not Necessary.** To make a settlement binding on the creditor as an accord and satisfaction, neither a receipt in full nor even an agreement to accept a part for the whole is necessary, if the creditor knows there is reasonable doubt as to the amount due and accepts the part tendered in full satisfaction. *Ib.*

DEMURRER.

Refusal Of Leave to File. It was not error to refuse leave to defendant to file a demurrer to the petition if the filing of it could not have availed him anything. *Oakley v. Richards*, 266.

DEPOSITION.

1. **Admission: By Agent of Party.** In order that the declarations of an agent may bind his principal as an admission the declarations must have been made during the continuance of the agency and in regard to the transaction then depending; if they were not contemporaneous with the transaction and illustrative of its character, but merely a subsequent narrative of how it occurred, they are not admissible in evidence against the principal. So that where defendants were sued on a cashier's bond for defalcations occurring prior to his discharge in 1904, statements made by the president of the bank in a deposition taken in 1906 are not admissible as admissions against the bank in its suit on the bond. *Savings Bank v. Denker*, 607.

DEPOSITION—Continued.

2. **Incomplete: Deprived of Right of Cross-Examination: Death of Deponent.** Where the taking of the deposition by defendants was not completed, but before the witness's examination in chief was concluded an adjournment was had at the request of defendants and with the consent of the parties, and it does not appear that the deposition was not completed on account of deponent's sickness, or that defendants made any effort thereafter to continue the taking of the deposition, or that the illness of deponent was so serious that the deposition could not have been finished at some time during the three months that he continued to live, the deposition cannot as such be admitted in evidence over the objection of plaintiff that he was deprived of the right of cross-examination. *Ib.*

DESCENTS AND DISTRIBUTIONS. See *Inheritances.*

DRAINAGE DISTRICT.

1. **Surface Water: Protection: Damages: Condemnation.** Overflow water from a stream is surface water, and the owner of land has the right by constructing embankments to shut off such surface water from his land without being liable in damages to the owner of another tract for the injury thus done. But that rule does not relieve a drainage district from responding in damages done to land between its levee and such stream by increasing the overflow of water on such land, for the drainage district does not own land or a right of way, but in seeking to condemn a right of way for its levee through the land of such owner must comply with the constitutional mandate declaring that "private property shall not be taken or damaged for public use without just compensation." *Drainage District v. Ham*, 384.
2. ———: ———: ———: ———: **Levee Through Owner's Land: Increased Overflow.** The exceptors owned 118.95 acres of land bounded by a river. The drainage district took 8.1 acres of the tract for the right of way of its levee, and the levee was so constructed as to leave 30.95 acres of the tract outside of the levee and between it and the river. *Held*, that, as the drainage district did not leave all of exceptors' land between the levee and the river, but appropriated a part of it for the levee right of way, it was liable in damages for the increased overflow of the river waters on the 30.95 acres, under that provision of the Constitution that says that "private property shall not be taken or damaged for public use without just compensation," and cannot escape the payment of such damages on the theory that the owner of lands has the right to shut off surface water from his lands without being liable in damages to another owner for the injury thus caused, for the drainage district is not the owner of any land, but is seeking to condemn a right of way for the levee through, and not outside of, exceptor's lands. [*Distinguishing Jackson v. United States*, 230 U. S. 1, and *Hughes v. United States*, 230 U. S. 24.] *Ib.*
3. **Bond: County Treasurer: Drainage District Funds: Common Law Liability.** The bond of a county treasurer, whose terms clearly include all county funds except school funds, the statute clearly requiring him to give bond for all moneys that shall from time to time come into his hands from any drainage district in the county, covers drainage district funds; and if not good as a statutory bond, because not conditioned exactly as prescribed by the statutes, is nevertheless good as a common-law bond, and covers drainage funds of districts organized after it was executed. *State ex rel. v. Blakemore*, 697.

DRIVER OF VEHICLES. See *Cities and Towns*, 16 to 18.

DUE PROCESS OF LAW. See *Constitutional Law*.

DUPLICATION OF PUBLIC UTILITIES. See *Public Utilities*.

EJECTMENT.

1. **Recovery of Property: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts, in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. *Shanklin v. Boyce*, 5.
2. **Quieting Title: Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him entitled to possession and to award a writ of possession in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession. *Koehler v. Rowland*, 573.
3. **———: ———: Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to defendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property." *Ib.*

ELECTRIC LIGHT PLANT. See *Public Utilities*.

EMINENT DOMAIN. See *Condemnation*.

EQUITY.

Recovery of Property: By Person Adjudged Insane Without Notice. Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property but may resort to equity in the first instance. *Shanklin v. Boyce*, 5.

ESTATES BY ENTIRETY.

Conveyance: Deed to Husband and Wife: Title in Survivor. The owner of land and his wife conveyed his land to their daughter, and the daughter by another deed conveyed it to her father and mother. *Held*, that the last deed created an estate by the entirety in the father and mother, and upon the father's death the entire legal fee simple estate remained in the mother. *Burke v. Murphy*, 397.

ESTOPPEL,

1. **Trust Estate: Substituted Trustee: Power to Sell Trust Land:** The *cestuis que trustent*, who, with actual notice, or with knowledge of facts demanding inquiry, have accepted the proceeds of a sale of land by a substituted trustee, have solemnly receipted to him for the full amount of the trust fund and have enjoyed and retain the fruits of such sale, cannot be heard in a court of conscience to say that the substituted trustee, under a clause of a will giving the original trustee power to invest the trust fund in real estate, had no power to sell the land, or that the court of the foreign State appointing him had no power to approve his sale of Missouri land; and whether such doctrine of preclusion be designated as *quasi-estoppel* or is more nearly akin to ratification or election, the result is the same—they cannot, under such circumstances, recover the land.

Held, by BOND, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the facts of the case do not show that the minor *cestuis que trustent* shared in the proceeds of the sale of the trust property by the substituted trustee, or that they had notice that when it was sold the proceeds were invested in other real estate the purchase price of which, when it was sold, was divided among them, nor do they show that it was so invested, and consequently the doctrine of *quasi-estoppel* does not apply to them. *Lawson v. Cunningham*, 128.

2. **Title to Land: Judgment as Estoppel.** In order that a judgment may have the effect of transferring title to land by estoppel, it must be pronounced by a court acting within the limits of a jurisdiction which authorizes it. If the court in pronouncing the judgment acted by virtue of a special or limited statutory jurisdiction, it can be upheld only when the plain letter of the law permits it. *Murphy v. Barron*, 282.

3. ———: ———: **Condemnation: Adverse Claimants to Award: Determination of Title.** Commissioners appointed by the court to assess damages in a condemnation proceeding begun by a railroad company estimated the value of a right-of-way one hundred feet wide through forty acres of land, at one hundred dollars. Plaintiff at the time was in possession claiming title, and defendant held a recorded deed made by the sheriff as a result of an execution sale under a judgment for taxes obtained against the plaintiff, who at the time the tax judgment was rendered was the owner and under sentence for a felony. The railroad company did not pay the money into court, but defendant upon the filing of the commissioners' report filed an interplea alleging he was the owner of the land and that plaintiff had no title or interest therein and asking that the money be awarded to him, and plaintiff later filed a like interplea alleging he was the owner and the defendant's deed was void and asking that the money be awarded to him. The trial court rendered judgment adjudging the defendant to be the owner of the land and ordering that the money be paid to him when it was paid into court. It was not paid into court, but defendant testified that it was paid to him. *Held*, that the judgment did not have the effect of transferring the title to defendant, but the contest related solely to the fund, and not to the land. *Held*, further, that the statutory proceeding for the fund was one *in rem* and jurisdiction cannot exist without the *res*, and the statute providing for an interplea only when the award is paid into court and that not having been done, the court had no jurisdiction to consider the title to the land or to award the fund to defendant. *Ib.*

ESTOPPEL—Continued.

4. **Prejudicial Misleading.** If the surviving widow, to whom and her husband a conveyance of an estate by the entirety had been made, by claiming a homestead in the land did not cause her husband's heirs to do or to refrain from doing anything which worked to their financial loss or prejudice, they cannot invoke the doctrine of equitable estoppel. *Burke v. Murphy*, 397.
5. **Defaulting County Treasurer: Commingling Funds.** In a suit on a county treasurer's bond it was not error to instruct the jury that if he failed to pay over a balance he owed, and if he mingled the several funds so they lost their identity and it became impossible to tell which fund, if any, was short, "then defendants are estopped to deny that such shortage belonged to the funds covered by the bond sued on," although estoppel was not pleaded, there being ample evidence of the facts predicated in the instruction. Whatever estops the principal usually estops the surety; and where he testified that he had mingled the funds and if there was any shortage it was impossible for him to tell where it was, neither he nor his sureties can profit by his wrong. *State ex rel. v. Blakemore*, 697.

EVIDENCE.

1. **Champerty: Concealed Interest in Suit: Compulsory Testimony.** It is not prejudicial error to refuse to compel the attorney of record for plaintiffs to testify whether he has a deed from plaintiffs to the lands in suit, or a contract with them whereby he is to receive an interest in the land in case judgment is rendered in their favor, for he is just as much concluded by a judgment against them as he would be had he been joined as a party. *Bell v. George*, 17.
2. **Payment of Taxes: By Whom: No Showing: Presumption.** In the absence of evidence on the subject, the court has a right to presume that the record owner of the land paid the taxes from the time the patent was issued in 1859 up until it was sold for the taxes of 1889, although such record owner is not shown to have been at any time in actual possession. The burden is upon the purchaser at the tax sale to show that the record owner had not paid the taxes prior to his purchase. *Ib.*
3. **Plat Book: Uncertified: Relied On to Show Owner of Land.** An uncertified plat book, purporting to have been made by the proper United States land office, is not competent evidence for any purpose; and, although such plat book shows the lands were entered by a certain person in 1857, and the patents, which were not recorded in the county where the lands are situate, show they were issued to the assignee of said entryman in 1859, the Collector of the Revenue is not authorized to rely upon such uncertified plat book in ascertaining the owner of the land, where the statute requires the suit to be brought against the owner of the land. *Ib.*
4. **—: Ancient Document.** An uncertified plat book, which does not purport to be the original, is not competent evidence as an ancient document. *Ib.*
5. **Patent: Notice: Recorded in County.** It is not necessary that the patent, which named a certain person as patentee and described him as the assignee of certain military bounty warrants,

EVIDENCE—Continued.

should be recorded in the county where the land lies, in order to impart notice to the tax collector that such patentee or his heirs are the owners of the land. The Act of Congress required the patents to be recorded in the General Land Office, and when so recorded they imparted notice to the tax collector that the said certificate holder had assigned his land warrants to the patentee. *Ib.*

6. **Sufficient Evidence: Adverse Claim by Grantor of Land: Limitations.** Testimony that the owner of land, in order to save it from the effect of pending litigation, voluntarily made and recorded a deed to his father-in-law, and thereafter, for sixteen years and up to the time of his death, remained in exclusive possession, making improvements, discharging all existing mortgages, paying all the taxes, and claiming to be the owner, and that after his death his children conveyed the land to his wife and that she thereafter for the two years prior to bringing suit continued in possession, was sufficient to establish the possession of said grantor and his said wife as being adverse, continuous, hostile, notorious and under claim of title for the statutory period of ten years. *Rottink v. Nagle, 196.*
7. **Witness: Competency: Sister of Deceased Donor of Bonds.** Decedent by one letter addressed to two sisters gave one forty bonds and the other twenty, which he afterwards borrowed from them and did not return, and both bring separate actions against the administratrix for the value of the bonds given to them respectively. *Held*, that he made separate and distinct gifts to each, and though the gifts were made in the same transaction, yet as neither had any interest in the bonds intended for the other, neither is disqualified by the statute to testify as a witness for the other in her separate suit. *Townsend v. Schaden, 227.*
8. **Gift: Intention and Delivery: Sufficient Evidence.** Where decedent by letter written in Indianapolis, directed to his sister, stated he was on that day sending to her, as a gift, at Chicago, forty bonds of a named company and of designated numbers, and on the same day entered in his diary a memorandum that he had given her said bonds, there is substantial evidence of his intention to give; and where, instead of sending them to her, by express as he had intended, he took them to the home of another sister and in her presence gave them to the designated donee, and then took them to a safety deposit box, where she found them a week later and where they remained for six months, when he borrowed them from her and by letter to her and by statements made to others admitted he had borrowed them, there is sufficient evidence of delivery, to support a verdict that the gift was complete, both as to intention and delivery. *Ib.*
9. ———: **Self-Serving Testimony.** Declarations or admissions of a donor as to the fact of delivery and as to his intention are admissible to support an alleged gift, but not to impeach his gift. Letters written or statements made by decedent subsequently to the time he made a gift of bonds to his sister, offered for the purpose of showing he had not given them to her, are self-serving and are not competent for that purpose. *Ib.*
10. ———: ———: **Explained By Other Witnesses.** A witness having testified that decedent declared he wished to return the bonds he had borrowed from his sisters, it was not error to refuse to permit another witness, who was present when the declarations were made, to testify that decedent said he was returning the bonds

EVIDENCE—Continued.

to his sisters for his own use, so that he might use them in case of necessity, because the proffered testimony was self-serving and could not be used to defeat the gift previously made. *Townsend v. Schaden*, 227.

11. ———: **Hearsay.** Statements made by decedent, at the time he wrote a letter to his sister in which he distinctly declared he was giving and sending her certain bonds, as to why he was writing the letter, were pure hearsay, self-serving and incompetent, when offered by his administratrix. *Ib.*
12. ———: **Conclusion.** Testimony as to why decedent turned to a diary at the time he wrote the letter of gift is a conclusion of the witness, and incompetent. *Ib.*
13. **Theaters: Difference in Floor Levels: Practicable Construction: Expert Testimony.** It was not error to permit an expert to testify that it was practicable to overcome differences in floor levels in theaters by gradients and inclined planes. It cannot be said as a matter of law that such methods of construction are so practicable that a jury are as capable of drawing correct conclusions on the subject as is an expert. *Oakley v. Richards*, 266.
14. **Will Contest: Subsequent Occurrences.** There is no hard-and-fast rule as to the incompetency of evidence on account of remoteness. Post cards written by testator a few days after execution of his will, to his granddaughter, there being no noticeable change in his mental condition between the two events, are competent evidence bearing on his testamentary capacity. *Wigginton v. Rule*, 412.
15. ———: ———: **Opinion of Lay Witnesses: Self-Invited Error.** An appellant, who by his conduct at the trial invites the error of which he subsequently complains, whether it be in the instructions asked or the evidence produced, is not on appeal entitled to a ruling that such error was prejudicial. It is an invasion of the province of the jury to permit lay witnesses in a will contest to give their opinions that testator did not have sufficient mind to know the value of his property or to realize his relations towards his children; but if proponents themselves open wide the door to the admissions of such opinions and invite them, both by the direct and cross-examination of witnesses, they will not on appeal be entitled to complain that the admission of the opinions of respondents' lay witnesses was prejudicial error. *Ib.*
16. **Expert Testimony: Conclusion.** Where the hypothesis is based upon an established fact that plaintiff received certain injuries on a given date, it is not prejudicial error to permit the expert witness to testify that the condition will be progressive and he will be rendered helpless, if the testimony is followed by an instruction that "the opinions of expert witnesses neither establish nor tend to establish the truth of the facts upon which they are based," and similar testimony was admitted without objection. *Laughlin v. Railway*, 459.
17. ———: ———: **Waiver.** A litigant will not be heard to complain of the admission of advisory expert testimony over his objection, where evidence of the same tenor has been admitted without his objection. *Ib.*
18. **Negligence: Character of Evidence.** Direct evidence to establish negligence is not required, but it may be sufficiently shown by facts and circumstances. The proof must do more than raise

EVIDENCE—Continued.

a conjecture as to the cause of the injury; it must show with reasonable certainty that the cause for which defendant is sought to be held liable produced the injury; but it is only when the evidence with all the inferences that the jury may reasonably draw therefrom is insufficient to support a finding for plaintiff, that the court is authorized to direct a verdict for defendant. *Ib.*

19. **Public Road: Transcript of County Court Record.** In the trial in the circuit court of a proceeding to establish a public road, where the issue as to damages is not being tried, but the only issue is the one of the public necessity of the proposed road, certified copies of the roll and record of the proceedings in the county court are proper evidence. In *Matter of Critzer*, 514.
20. ———: **Notices: Certified Copy of Affidavit.** An objection that a certified copy of the affidavit filed in the county court showing proper posting of notices of the intended application for the establishment of a proposed public road is not the best evidence and should not have been admitted in evidence in the trial on appeal in the circuit court until the loss of the original was accounted for, made for the first time in the Supreme Court, will not be ruled. *Ib.*
21. **Seduction: Corroboration.** While it is not necessary, in a prosecution for seduction, that there shall be two witnesses to sustain the charge, nor need the corroborative evidence be tantamount to another witness, it must be sufficient to counterbalance the testimony of the accused and thus remove the legal presumption of his innocence. *State v. Stemmons*, 544.
22. ———: ———: **Promise of Marriage.** In a prosecution for seduction corroborative testimony is required only as to the promise of marriage, and may consist of circumstances, but must come from others than the prosecutrix. It may consist of evidence of such conduct on the part of the parties as usually accompanies a promise of marriage, or admissions of the defendant, or continued attentions by him to prosecutrix, covering a long time, including frequent visits, during which she kept no other company, and proof of preparations for marriage made by prosecutrix following a continuous courtship is competent. *Ib.*
23. ———: **Promise of Marriage: When Made.** In a prosecution for seduction it is not necessary that the promise of marriage be made immediately preceding the intercourse; all that is necessary to show is that if made then or previously defendant thereby accomplished prosecutrix's seduction. *Ib.*
24. ———: **Proof That Prosecutrix Was Unmarried.** It is essential in a seduction case that it be made to appear by evidence that prosecutrix was unmarried; but such status may be shown by facts and circumstances. So where prosecutrix testified that she had never had sexual intercourse with any one except defendant, that he told her that if she got into trouble on account of her relations with him he would marry her at once, she bore her parent's name, was questioned throughout the trial as "Miss," was referred to as "this girl," and the details of her manner and place of living and of her associations with defendant indicated an unmarried status, the evidence was sufficient to support a finding that she was unmarried, although there was no affirmative statement by any witness that she was unmarried. *Ib.*

EVIDENCE—Continued.

25. **Fraudulent Conveyances: Purpose: Payment of Consideration.** The purpose of an ante-dated conveyance by a cotenant, against whom suit had been brought by a neighbor for alienating his wife's affections, to his two brothers, may be deduced from a survey of all the facts connected therewith. And if they show a purpose on the grantor's part to put the property beyond the reach of an execution which might follow an apprehended judgment, the conveyance was fraudulent on his part; and if the grantees accepted the deed with a knowledge of his fraudulent purpose, and with the intent to assist him in the perpetration of the fraud, it was a fraudulent transaction on their part, and the deed should be set aside at the suit of the judgment creditor, notwithstanding the grantees may have paid the grantor what the property was worth. *Barber v. Nunn*, 565.
26. ———: ———: **Facts for Consideration.** And in determining whether fraud existed on the part of both grantor and grantee, the court is authorized to take into consideration their relationships to each other, the manner in which their business was conducted both before and after the deed was made, and the continued exercise of authority of the grantor over the property after the execution of the deed. *Ib.*
27. ———: **Failure to Testify.** Where the petition directly charges fraud against the grantees and grantor of a deed, their unexplained failure to appear and testify is to be regarded as a strong circumstance against them, whether they were subpoenaed by plaintiff or not. *Ib.*
28. **Deposition: Admission: By Agent of Party.** In order that the declarations of an agent may bind his principal as an admission the declarations must have been made during the continuance of the agency and in regard to the transaction then depending; if they were not contemporaneous with the transaction and illustrative of its character, but merely a subsequent narrative of how it occurred, they are not admissible in evidence against the principal. So that where defendants were sued on a cashier's bond for defalcations occurring prior to his discharge in 1904, statements made by the president of the bank in a deposition taken in 1906 are not admissible as admissions against the bank in its suit on the bond. *Savings Bank v. Denker*, 667.
29. ———: **Incomplete: Deprived of Right of Cross-Examination: Death of Deponent.** Where the taking of the deposition by defendants was not completed, but before the witness's examination in chief was concluded an adjournment was had at the request of defendants and with the consent of the parties, and it does not appear that the deposition was not completed on account of deponent's sickness, or that defendants made any effort thereafter to continue the taking of the deposition, or that the illness of deponent was so serious that the deposition could not have been finished at some time during the three months that he continued to live, the deposition cannot as such be admitted in evidence over the objection of plaintiff that he was deprived of the right of cross-examination. *Ib.*
30. **Same Rules in Law and Equity.** The general rules of evidence in courts of law and in courts of equity are the same, and there seems to be no reason under the code of procedure for applying different rules to the admissibility of testimony. *Ib.*

EVIDENCE—Continued.

31. **Errors of Trial Court: Attack by Respondent.** Respondent on appeal may attack erroneous rulings of the trial court for the purpose of sustaining his judgment. He may point out errors committed against him in order to sustain a judgment in his favor. Where plaintiff objected to the admission in evidence of a deposition, and was overruled by the referee, who nevertheless made findings in his favor, with which he was satisfied and which were approved by the trial court and judgment was rendered in his favor, he has the right on defendant's appeal, in an effort to sustain his judgment, to object to the competency of the deposition, and ask the court to exclude it from consideration, because it was erroneously admitted in evidence by the referee. *Ib.*
32. **Suit on Bond: Admission of Principal: Binding on Sureties: Res Gestae.** An admission of the principal in an employee's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety in the trial of a suit on the bond. And the words "while engaged in the discharge of his duties" mean that any statement made by the principal during the continuance of the term for which the sureties are bound concerning any transaction during that term, is admissible against the sureties. So that where an investigation of the cashier's shortage was begun on the fifth of the month and the directors instructed him to make no further entries on the books, and other persons were put in charge of them, although he continued in and around the bank until his discharge on the ninth, a written statement explaining the discrepancies and his false entries made to a director and signed by him on the seventh, was competent evidence against the sureties on a bond which covered the period and made them liable for any loss occasioned by his act. *Ib.*
33. **City's Money: City Treasurer: Special Deposit.** The writing of the words "special deposit" upon the book of the bank in which a city fund was deposited by the city treasurer amounted to nothing under the circumstances of this case, in which there was no suggestion made that the fund was to be segregated from other moneys of the bank and kept intact as a special deposit. *University City v. Schall*, 667.
34. ———: ———: **Good Character.** Evidence of a county treasurer's good character is not admissible in a suit on his bond to recover the amount of county funds appropriated to his own use. *State ex rel. Blakemore*, 697.

FORFEITURE.

1. **Conveyances: Condition: Occupation by Negroes.** Where the deed contained a condition that the property "shall not be sold, leased or rented to negroes" a breach is shown if a part of the building on the lot was leased to negroes, the intention of the restriction being to prevent negroes from coming on the premises as tenants; and the deeds must be interpreted in accordance with that manifest intention, as gathered from them as a whole. *Koehler v. Rowland*, 573.
2. ———: **Restrictive Sale or Use.** Forfeiture is a harsh remedy and where a stipulation in a deed can be construed as a mere restrictive covenant and not a condition, so as to avoid a forfeiture, it will be so construed; and the question is to be determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object

FORFEITURE—Continued.

in view; but where the language is unmistakable, particularly where there is a provision for re-entry upon a breach of the condition, or where the right to re-enter is plainly implied, it is a forfeiture. *Koehler v. Rowland*, 573.

3. ———: **Sale or Lease to Negroes.** The deed contained a condition that the "above described property shall not be sold, leased or rented to any negroes for twenty-five years from date hereof, and in event of such transfer, lease or rental before the expiration of said term, said property shall revert to grantor or sellers without process of law or equity." *Held*, to provide, in perfectly clear language, for a forfeiture on breach of condition and for a re-entry; and if not clearly expressed, forfeiture is implied in the language used. Such condition does not come within the rule prohibiting restraints upon alienation. *Ib.*
4. ———: ———: **Restraint Upon Alienation.** It is within the right and power of a grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. *Ib.*
5. ———: ———: **Public Policy.** A condition in a deed that the property is not to be "sold, leased or rented to negroes for twenty-five years" is not void as against public policy. The purpose of the restriction being to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes, it comes within the rule that conditions in deeds which prohibit the use of property for certain purposes, in order that it may become more desirable as places of residences for families, are valid. *Ib.*
6. ———: ———: **Change in Conditions: Question of Fact.** If the purpose of a condition in a deed declaring that the property "shall not be sold, leased or rented to negroes" can no longer be accomplished, owing to changed circumstances, such as the growth of the city and the present use by negroes of the whole neighborhood, and it would be oppressive and inequitable to give effect to such condition, it will not be enforced; but where the evidence as to such changed circumstances is conflicting, the appellate court will accept the finding of the trial court that there had been no such change, as conclusive in a law case, and will not refuse to enforce the condition on such ground. *Ib.*

FORFEITURE OF BOND. See **Bond**.

FRAUDULENT CONVEYANCES.

1. **Garnishment: No Indebtedness to Defendant.** No judgment can be rendered against garnishees unless it appears that at the time of the service of the writs they were in possession or custody of money or property or effects belonging to the defendant or were indebted to defendant. *Saunders v. Hackley & Hume Co.*, 41.
2. ———: ———: **Voluntary Transfer of Assets.** Even if defendant corporation was at the time indebted to plaintiff, as made manifest by subsequent suit, though no claim had previously been made, a voluntary transfer of negotiable bonds and notes in the form of dividends to stockholders, is not presumptively fraudulent in law nor voidable, if defendant owed nothing except plaintiff's claim and retained sufficient property to pay said claim. *Ib.*
3. ———: ———: ———: **Burden of Proof.** The burden rests upon the interpleading stockholders of defendant corporation to prove

FRAUDULENT CONVEYANCES—Continued

- that, at the time of the voluntary transfer to them, as dividends, of negotiable bonds and notes payable to defendant, the defendant retained sufficient assets to pay plaintiff's claim; but having established that fact by showing that defendant still owns property far in excess of plaintiff's claim, and that there was no actual fraud, the writs of garnishment must be dismissed. *Ib.*
4. **Limitations: Grantor's Adverse Possession.** Title to land may, by the Statute of Limitations, be reinvested in a fraudulent grantor. A grantor by deed, whether in good faith and a valuable consideration, or to avoid the payment of his debts, may reacquire the fee-simple title to the lands conveyed, by adverse possession thereof for the statutory period of ten years. *Rottink v. Nagle*, 196.
 5. **Raised by Party Without Interest.** The point that a deed was fraudulently procured by the grantees cannot be raised by persons who will in no wise be benefited if the deed is set aside. Where a valid warranty deed was made by a daughter to her father and mother, the children of the said father by a former marriage cannot raise the point that a deed by the surviving widow to her said daughter was fraudulently procured, since if it were set aside the title would not pass to them, but to the heirs of the grantor. *Burke v. Murphy*, 397.
 6. **Purpose: Payment of Consideration.** The purpose of an antedated conveyance by a cotenant, against whom suit had been brought by a neighbor for alienating his wife's affections, to his two brothers, may be deduced from a survey of all the facts connected therewith. And if they show a purpose on the grantor's part to put the property beyond the reach of an execution which might follow an apprehended judgment, the conveyance was fraudulent on his part; and if the grantees accepted the deed with a knowledge of his fraudulent purpose, and with the intent to assist him in the perpetration of the fraud, it was a fraudulent transaction on their part, and the deed should be set aside at the suit of the judgment creditor, notwithstanding the grantees may have paid the grantor what the property was worth. *Barber v. Nunn*, 565.
 7. **—: Facts for Consideration.** And in determining whether fraud existed on the part of both grantor and grantee, the court is authorized to take into consideration their relationships to each other, the manner in which their business was conducted both before and after the deed was made, and the continued exercise of authority of the grantor over the property after the execution of the deed. *Ib.*
 8. **Failure to Testify.** Where the petition directly charges fraud against the grantees and grantor of a deed, their unexplained failure to appear and testify is to be regarded as a strong circumstance against them, whether they were subpoenaed by plaintiff or not. *Ib.*

FUND COMMISSIONERS. See **Legislative Power.**

GARNISHMENT.

No Indebtedness to Defendant. No judgment can be rendered against garnishees unless it appears that at the time of the service of the writs they were in possession or custody of money or property or effects belonging to the defendant or were indebted to defendant. *Saunders v. Hackley & Hume Co.*, 41.

GIFT.

1. **Appellate Practice: Weight of Evidence: In Law Case.** A claim against an administrator for the recovery of the value of bonds borrowed by decedent from claimant and never returned, commenced in the probate court and taken by appeal to the circuit court, is an action at law, and if the verdict in favor of claimant is supported by substantial evidence, the trial court is within the law in overruling a demurrer thereto, and it is not the province of the appellate court to pass upon the weight of the evidence. *Townsend v. Schaden*, 227.
2. **Witness: Competency: Sister of Deceased Donor of Bonds.** Decedent by one letter addressed to two sisters gave one forty bonds and the other twenty, which he afterwards borrowed from them and did not return, and both bring separate actions against the administratrix for the value of the bonds given to them respectively. *Held*, that he made separate and distinct gifts to each, and though the gifts were made in the same transaction, yet as neither had any interest in the bonds intended for the other, neither is disqualified by the statute to testify as a witness for the other in her separate suit. *Ib*.
3. **Intention and Delivery: Sufficient Evidence.** Where decedent by letter written in Indianapolis, directed to his sister, stated he was on that day sending to her, as a gift, at Chicago, forty bonds of a named company and of designated numbers, and on the same day entered in his diary a memorandum that he had given her said bonds, there is substantial evidence of his intention to give; and where, instead of sending them to her, by express as he had intended, he took them to the home of another sister and in her presence gave them to the designated donee, and then took them to a safety deposit box, where she found them a week later and where they remained for six months, when he borrowed them from her and by letter to her and by statements made to others admitted he had borrowed them, there is sufficient evidence of delivery, to support a verdict that the gift was complete, both as to intention and delivery. *Ib*.
4. ———: **Self-Serving Testimony.** Declarations or admissions of a donor as to the fact of delivery and as to his intention are admissible to support an alleged gift, but not to impeach his gift. Letters written or statements made by decedent subsequently to the time he made a gift of bonds to his sister, offered for the purpose of showing he had not given them to her, are self-serving and are not competent for that purpose. *Ib*.
5. ———: ———: **Explained By Other Witnesses.** A witness having testified that decedent declared he wished to return the bonds he had borrowed from his sisters, it was not error to refuse to permit another witness, who was present when the declarations were made, to testify that decedent said he was returning the bonds to his sisters for his own use, so that he might use them in case of necessity, because the proffered testimony was self-serving and could not be used to defeat the gift previously made. *Ib*.
6. ———: **Hearsay.** Statements made by decedent, at the time he wrote a letter to his sister in which he distinctly declared he was giving and sending her certain bonds, as to why he was writing the letter, were pure hearsay, self-serving and incompetent, when offered by his administratrix. *Ib*.
7. ———: **Conclusion.** Testimony as to why decedent turned to a diary at the time he wrote the letter of gift is a conclusion of the witness, and incompetent. *Ib*.

GIFT—Continued.

8. ———: **Instructions.** Instructions set out in the opinion embodied correct principles of law applicable to gifts *inter vivos*. Ib.
9. ———: **Limitations: Five Years.** An action of assumpsit brought by a sister in January, 1914, against the donor's administratrix, for the value of bonds given to her by her brother in October, 1907, and by him borrowed from her in March, 1908, and never returned, where the evidence shows the donor and donee had mutual dealings in regard to the bonds up to and including 1911, was not barred by the five-year Statute of Limitations. Ib.

GRAIN SCALES.

Public Service Commission: Repeal of Prior Statutes. The Public Service Act, by Section 49, Laws 1913, p. 588, invested the Commission with power to make an order for the erection and maintenance of track scales by a railroad company whenever public necessity therefor exists, and it repealed all prior statutes which interfered with the Commission's discretion to determine, in each individual case, the existence of the public necessity or public convenience. It repealed Section 3157, Revised Statutes 1909, which required a railroad company to erect and keep in good condition, for use in weighing grain shipped over its road, true and correct scales, at all stations from which the shipments for the previous year amounted to fifty thousand bushels or more. And an order of the Commission which requires such scales to be maintained at a certain station, based alone on said Section 3157 and a showing that for the previous year fifty thousand bushels were shipped from said station, without any further showing of public necessity or public convenience, is invalid. State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Com., 60.

GUARDIAN AND CURATOR.

1. **Appointment: Insane Person: No Notice.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving Hunt Searcy, 167 Mo. 158.] Shanklin v. Boyce, 5.
2. ———: ———: **Uselessness of Notice.** The suggestion that a notice of a lunacy inquiry to an insane person is useless and meaningless begs the question; for the issue to be tried is whether he is or is not insane, and to fail to give him notice on the ground that he is insane forestalls the very purpose of the inquiry. Ib.
3. **Recovery of Property: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts, in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. Ib.

HABEAS CORPUS.

1. **Not of Legislative Creation.** Relief from illegal imprisonment by *habeas corpus* is not the creature of any statute. The writ cannot be abrogated by the Legislature. The Constitution (Art. 2, sec. 26) provides that its privileges shall never be suspended. The Legislature has confined its action principally to facilitating the use of the writ, and the courts cooperate with it in extending these facilities. In *re Webers*, 677.
2. **Jurisdiction: Appeal.** The Supreme Court has no appellate jurisdiction in a *habeas corpus* proceeding, for an appeal does not lie in such a proceeding. *Ib.*
3. —: **Constitutional Question.** Whether or not the statute under which a petitioner is imprisoned is constitutional, if he applies to a court of appeals for a writ of *habeas corpus* and that court proceeds to final action, whether by discharging him or remanding him to custody, that case is at an end. If not discharged, but is remanded to custody, his course, if he wishes the Supreme Court to determine the constitutionality of the statute and the consequent validity of his imprisonment under the statute, is to apply to that court for its writ. No way is provided, either by the Constitution or statutes, by which the Supreme Court can acquire jurisdiction in a *habeas corpus* proceeding otherwise than by the use of its own writ, directed to be issued either by itself or by one of its judges. *Ib.*
4. —: **Transfer from Court of Appeals to Supreme Court: Constitutional Question.** A court of appeals, having issued its writ of *habeas corpus* on behalf of a prisoner who alleges he is being illegally deprived of his liberty, has no authority, when the constitutionality of the statute under which he is held is properly assailed, to transfer the case to the Supreme Court, on the ground that the constitutionality of said statute is involved. The Supreme Court cannot by transfer acquire jurisdiction in a *habeas corpus* case. [Rule announced in *Moberly v. Lotter*, 266 Mo. 457, criticized.] *Ib.*

HEIRS. See Inheritances.

HOMESTEAD.

1. **Estate By Entirety: Claim of Homestead: Waiver.** A widow, who does not know that she is the owner of an estate by the entirety in the land, does not waive her fee simple title to the entire estate by claiming a homestead interest after her husband's death. *Burke v. Murphy*, 397.
2. —: **Estoppel: Prejudicial Misleading.** If the surviving widow, to whom and her husband a conveyance of an estate by the entirety had been made, by claiming a homestead in the land did not cause her husband's heirs to do or to refrain from doing anything which worked to their financial loss or prejudice, they cannot invoke the doctrine of equitable estoppel. *Ib.*

HOSPITAL, COUNTY. See Taxes and Taxation, 29 to 33.

IMPROVEMENTS ON LAND, COMPENSATION. See Ejectment.

INCOME TAX.

1. **Legislative Power: How Far Plenary.** The Legislature of a State, unless fettered by either the State or Federal Constitution, is vested, in its representative capacity, with the plenary power

INCOME TAX—Continued.

of the people, and can legislate at will. In consequence, no legislative act will be adjudged to be repugnant to the Constitution if any reasonable doubt of its constitutionality exists in the judicial mind. *Wire Co. v. Wollbrinck*, 339.

2. **In Proportion to Value: Property.** A tax on income is not, in the constitutional sense, a tax on property, and hence the provision of the Constitution requiring that "all property subject to taxation shall be taxed in proportion to value" does not render invalid the Income Tax Law of 1917 which imposes a tax upon "the income of a taxable person." The word "property" in that clause was meant to include only those distinct classes of property which, because of their peculiar nature can be measured in value, become the object of taxation independent of the owner, and are susceptible, by proper procedure, to lien or seizure for the enforcement of the tax. Prior to the adoption of the Constitution of 1875 the word "property," by judicial decision, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue, and when used in said Constitution it was not intended to include the usufruct of property, nor the earnings of physical or mental labor.

Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is property and a tax on incomes is a direct tax on property. Income is always paid in money or kind, that is, in real or personal property from which it accrues. Net income is the original and sole source of all existing private property. The very meaning of the word income is that it is "that gain which proceeds from labor, business, property or capital of any kind;" and this is substantially the definition given, in more elaborate words, in the Income Tax Act of 1917. A tax upon income accruing out of real or personal property is a tax upon such property itself; and an income arising from labor is money, which is property, and hence a tax on such income is a tax on property. *Ib.*

3. ———: ———: **Prior Definition: Adoption.** Words in their context used in a prior constitution and construed by the highest court, when employed in a later constitution, are presumed to have been adopted with their adjudicated meaning, unless a contrary intention is manifest; and, hence, the word "property" used in the provision of the Constitution of 1875 which requires all property to be taxed in proportion to its value, having been used in similar sections of the two previous constitutions and having been construed by the Supreme Court not to include incomes, was used in the same sense and meaning in which, by judicial construction, it had been previously employed.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Constitution of 1865 contained no provision requiring taxes to "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," nor did it contain any provision conferring the power of taxation upon the Legislature, but assumed that such power was inherent; and while the Constitution of 1875 also assumed that the power of taxation was inherent in the Legislature, that power was carefully limited and restricted, among other things, by clauses (a) which required the tax to be uniform and (b) inhibiting the enactment of laws exempting any property from taxation except certain property specifically enumerated. *Ib.*

INCOME TAX—Continued.

4. ———: ———: **Income as Tangible Property.** That income is property, and that a taxation of income from land or invested personality is, in effect, a taxation of the thing producing the income, does not render a statute imposing a tax on incomes violative of the provision of the Constitution which declares that all property shall be taxed in proportion to value. Those considerations do not alter the fact that incomes are distinguishable from the tangible or intangible property yielding them.
Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is not an intangible entity which the State may tax in a transmutation stage, after its production but pending its fixed investment in or transformation into some other sort of property. *Wire Co. v. Wollbrinck*, 339.
5. **Exemptions.** Since the limitations of the Constitution relating to *ad valorem* taxation upon property have reference solely to tangible and specific lands and personality, the excluded classes of property embracing incomes are not within its regulative provisions specifying what property shall be exempt from taxation.
Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that the Income Tax Act, which exempts from the tax incomes of unmarried persons to the extent of \$3,000 and of married persons to the extent of \$4,000, and imposes the tax upon all sums in excess of said amounts and on the entire income of business corporations, is violative of that clause of the Constitution which says that "all laws exempting property from taxation" other than property used exclusively for religious worship, schools or purposes purely charitable "shall be void," and, besides, in so doing, violates the other clause which says that taxes "shall be uniform upon the same class of subjects." *Ib.*
6. **Uniformity: Classification: Graduation.** The Constitution does not prescribe uniformity of taxation as to any subject-matter of taxation except property in the constitutional sense, which does not embrace incomes. The provision of the Constitution which requires taxes to "be uniform upon the same class of subjects" recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. Since the Income Tax Act of 1917 classifies persons, corporations and entities, and provides a classification, as to amount, of the portion of the net income of each class of persons, corporations and entities which it makes subjects to the tax, and further provides for the payment of an identical rate of taxation by each of the classes made subject to the burden, and requires each person, corporation or entity to pay the same tax which is to be paid by every other person, corporation or entity belonging to the class, it does not violate the constitutional rule of uniformity. The Legislature, by the express constitutional terms, had the power to create the classification of the distinct subjects contained in the act.
Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Income Tax Act is (a) a revenue measure purely; (b) the tax it imposes is not an occupation tax, because, while it taxes incomes derived from labor, trades, business and professions, it also taxes incomes from rents on land and interest from bonds, money loaned and all other income from either real or personal property; (c) it is not a license law, imposing a license tax, for no regulation or the exercise of the police power is involved; (d) it imposes a direct tax,

INCOME TAX—Continued.

in contradistinction to an indirect tax, because the tax is demandable and collectible from the identical person against whom it is levied; and (e) since income is property it is a direct property tax, or a direct tax upon property. Said act, therefore, violates the constitutional rule that taxes "shall be uniform upon the same class of subjects," because: (1) incomes of unmarried persons less in amount than \$3,000 are not by it taxed at all; (2) incomes of married persons less than \$4,000 in amount are not taxed at all; (3) incomes from realty and personalty are, in effect, taxed at the rate of 35 cents on each \$100 thereof; (4) incomes from labor and professions are taxed at the rate of 50 cents on the \$100 thereof; (5) incomes of business corporations are taxed on the total amounts thereof, without any exemption whatever; and (6) incomes from numerous alleged educational, fraternal, charitable, benevolent, agricultural and religious corporations and associations, not enumerated in the constitutional exemption list, are wholly exempt from the tax, and therefore (in which WILLIAMS, J., also concurs) these exemptions are violative of the clause of the Constitution which says that "all laws exempting property from taxation, other than the property above enumerated, shall be void," and the exemptions contravene the rule of uniformity prescribed by the Constitution. The word "uniform" used in the Constitution means "conforming to one rule, not varying or variable;" and whether an income tax is a property, or a license, or an occupation tax, the Constitution requires it to be uniform in its burdens upon the same class of subjects, that is to say, upon incomes; and no more permits a graduated tax on incomes than a graduated tax on property. *Ib.*

7. ———: ———: **In Excess of Property Taxes.** Section 32 of the Income Tax Law of 1917 is not unconstitutional because it creates a class consisting of persons whose income taxes exceed those paid on their real and personal property and imposes a tax on their incomes to the extent that their income taxation exceeds their property taxation. Persons belonging to such a class occupy a relation of support to the State reasonably distinguishable from others who pay taxes only on their income, and therefore such a classification does not contravene the constitutional requirement that taxes shall be uniform on the same class of subjects. [FARIS, WOODSON and WILLIAMS, JJ., dissenting.] *Ib.*
8. ———: ———: **U. S. Constitution.** The Income Tax Act of 1917 does not contravene the Fourteenth Amendment of the U. S. Constitution. The State has the freedom of a sovereign both as to objects and methods of taxation. *Ib.*

INHERITANCES.

1. **Constitutional Law: Descents and Distributions: Wills.** There is no constitutional provision restricting the power of the Legislature to change or modify the laws relating to descents and distributions or the laws relating to wills. *State ex rel. McClintock v. Guinotte*, 298.
2. **Not Natural Right.** Inheritance of property is not an absolute or natural right. There is no constitutional provision which would prohibit the Legislature from changing or abolishing entirely the law as to descents and distributions, whether the transmission of property be by will or by intestacy. The right to inherit property is neither a natural right, nor a constitutional

INHERITANCES—Continued.

right in this State, but a right which the sovereign may grant or withhold, or may grant upon condition; and since there is no constitutional restriction, the Legislature may abolish or modify the laws permitting the transfer of property by will, as well as statutes governing descents and distributions, and may say what portion, upon an owner's death, shall be appropriated by the State, and to whom and in what proportions the balance shall go. State ex rel. McClintock v. Guinotte, 298.

3. **Inheritance Tax.** The right of the State to foreclose absolutely or partially the right to inherit property, by law or will, and to say what is to become of it when death forecloses the owner's right to control it, is not strictly the exercise of the taxing power, although the percentage to be retained by the State is designated in the statute as a tax, but is the exercise of that other power which inheres in sovereignty, unless restricted by the Constitution, to say what shall be done with the property upon the owner's death. The designation of the portion to be retained or collected by the State as a tax is, in effect, an expression of the condition upon which the persons designated in the statutes of descents and distributions or in the testator's will may take the property, and is not a tax at all. Ib.
4. ———: **Constitutional Restrictions.** Since a statute prescribing the amount of inheritance taxes shall be imposed on devises or inheritances is not an exercise of the taxing power, the validity of the statute is not affected by the divers and sundry constitutional restrictions relating to taxation. Ib.
5. ———: **Repeal of Conflicting Statutes.** The fact that the Act of 1917 designates the portion of an inheritance which the State is to retain or collect as a tax and that it does not in express words repeal statutes relating to descents and distributions or wills, does not make it an exercise of the taxing power. In spite of those things, it operates to repeal so much of those statutes as conflict with it. Ib.
6. **Due Process.** An inheritance law, which requires the probate court to appraise the property owned by a decedent, and to exempt \$15,000 of that devised to or inherited by his widow and \$5,000 of that devised to or inherited by each of his children, and requires an appropriation by the State of certain graduated percentages of the balance, as a condition of their receiving the inheritances or devises, not being an exercise of the power of taxation, does not in any sense deny to them due process of law. Ib.
7. **Title Act: Repeal of Conflicting Existing Statutes.** The title to the Inheritance Law of 1917 is in all respects sufficient, although the body of the act modifies or repeals, not by express words but by affirmative provisions, certain conflicting portions of the statutes relating to descents and wills, and no reference is made to them in the title. The body of the act is within the purview of the title and is clearly indicated by it, and that is sufficient; and that being true, so much of the existing statutes as conflict with it will be held to be to that extent repealed or modified. Ib.
8. **Inheritance Tax: Payment into State Treasury.** Devisees or heirs, whose inheritances or devises have by the probate court been charged by its judgment with taxes according to the Inheritance Law, are not, in a *certiorari* to that court, by which they attack the constitutionality of said act, in any position to raise the point that the act violates that portion of the Constitution which provides that no money shall be diverted from the State Treasury

INHERITANCES—Continued.

except by proper appropriation bills. Whether that portion of the act requiring the money to be paid into the State Treasury and providing that upon proof of an erroneous payment the amount of the tax erroneously paid may be refunded, is valid or invalid, does not concern them, and is not in the case, and therefore is not decided, for even if that part of the act is invalid the rest of it is not. *Ib.*

9. ———: ———: **Local of Special Law.** The Inheritance Law of 1917 is a general and not a special or local law. *Ib.*
10. ———: ———: **Graduated: Unnatural Classification: Public Welfare.** The classifications made by the Inheritance Law of 1917, which exempts from the tax \$15,000 of decedent's property for the widow and \$5,000 for each child, and fixes a tax of one per cent on the balance up to \$20,000, and a tax of two per cent on the next \$20,000, and a tax of three per cent on the next \$40,000, and larger percentages, by a graduated scale, on larger amounts, is not unreasonable. The reasonableness of a classification is to be measured in the light of modern public welfare, and that may require a graduation of the tax in proportion to the amount of property given to the legatees or heirs by the State, which has the power to appropriate the whole of decedent's property upon his death. A law which classifies the receipts of the State's favor according to the amounts received is not an unreasonable classification. *Ib.*
11. ———: ———: **Taxation on Property: Uniform: According to Value: Public Purpose.** The Inheritance Law of 1917 is not an exercise of the taxing power of the State; but even if it be the exercise of the taxing power, it is not a tax upon property, but a tax upon the transmission or succession of property upon the death of the owner, and not being a tax upon property it does not violate the constitutional provision declaring that taxes can be levied only for a public purpose, or the provision that taxes shall be uniform upon the same class of subjects, or the provision that all property subject to taxation shall be taxed in proportion to value. *Ib.*
12. ———: ———: **Classification According to Burden.** There can be a class within a class, and a classification by an inheritance law of recipients of a decedent's property according to amounts received and kinship is not unreasonable. Property passes upon the owner's death to others only by the grace of the State, and if the burdens imposed as a condition of succession be granted according to amounts received or relationships to him they do not constitute an unconstitutional classification, even though they be imposed by an exercise of the taxing power. But the provisions of the Constitution concerning taxation have reference to those burdens or taxes fixed by law which are recurrent at fixed periods, not to duties imposed which occur only once, and hence they are not applicable to what is ordinarily denominated an inheritance tax. *Ib.*

INJUNCTION.

Prior Notice. The giving of notice of an application for temporary injunctive relief and the appointment of a receiver for a corporation is not a necessary precedent condition in all cases. Where the need is crying notice is not a prerequisite. *State ex rel. v. Reynolds*, 113.

INSANITY.

1. **Guardian and Curator: Appointment: Insane Person: No Notice.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving *Hunt v. Searcy*, 167 Mo. 158.] *Shanklin v. Boyce*, 5.
2. ———: ———: **Uselessness of Notice.** The suggestion that a notice of a lunacy inquiry to an insane person is useless and meaningless begs the question; for the issue to be tried is whether he is or is not insane, and to fail to give him notice on the ground that he is insane forestalls the very purpose of the inquiry. *Ib.*
3. **Recovery of Property: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts. in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. *Ib.*

INSTRUCTIONS.

1. **Gift: Instructions set out in the opinion embodied correct principles of law applicable to gifts *inter vivos*.** *Townsend v. Schaden*, 227.
2. **Picture Theater: Step-Off in Aisle: Assumption of Risks.** Where the petition charged that the aisle of a moving-picture theater was four inches lower than that part of the floor on which the seats rested, that such step-off was in violation of a designated ordinance, that such construction was negligence, that plaintiff had no knowledge of such step-off and that there was not sufficient light to enable her to see it, an instruction on the assumption of risks which ignores such allegations is properly refused. *Oakley v. Richards*, 266.
3. **Will Contest: Inheritable Interest.** It is not error to refuse to instruct the jury that a granddaughter of testator, a daughter of an insane daughter, named as a devisee, will inherit no interest in his estate if the will is set aside, though it contains a correct statement of the law. It could not aid the jury in determining the issue of testamentary capacity. *Wiggington v. Rule*, 412.
4. ———: **Formal Execution.** An instruction telling the jury that the will "was executed in conformity with the provisions of the law relating to the execution of wills" should not be given. Since the law requires a will to be executed by one of sound mind, its meaning is too obscure and uncertain; besides, where there is no controversy about the formal execution of the will, the jury need no instruction on the point. *Ib.*
5. **Contributory Negligence: Burden: Restriction to Plaintiff's Evidence.** Under the Federal Employer's Liability Act an instruction for plaintiff which places upon the defendant the

INSTRUCTIONS—Continued.

burden of proving contributory negligence is not error. Nor under the circumstances of this case can defendant complain that to such instruction was not added the clause: "unless the jury find from plaintiff's own evidence and the witnesses introduced by him that he was guilty of contributory negligence." The instruction given did not specify what things were done or known by plaintiff, and if defendant desired an ampliation or qualification of it in order to present its contention to the jury, it was its duty to ask a proper instruction, appropriate to the evidence and pleading, presenting that view. *Laughlin v. Railway*, 459.

6. ———: **Pleading: Proof.** If contributory negligence is not pleaded an instruction presenting it as a defense should not be given; and if pleaded and there is no evidence to support the plea, no instruction on the subject should be given. Where defendant's only plea of contributory negligence was that, if plaintiff was injured, it was the result of his own negligence in attempting to climb on a moving freight train without properly using the stirrup, an instruction declaring that he was guilty of contributory negligence if he did not intelligently use the means at hand to ascertain if there were any pitfalls or obstacles on the right-of-way against which his feet might strike as he attempted by grasping the stirrup to mount the moving car, would have been improper. *Ib.*
7. **Seduction: Argumentative: Comment on Evidence: Attributing Pregnancy to Betrayal.** An instruction which is argumentative in form, and an improper comment on the testimony of prosecutrix, should be refused; and an instruction in a seduction case, which tells the jury that they should "scrutinize the testimony of the prosecutrix very closely, for the law assumes that a woman, finding herself pregnant, has the most potent motives to assert her condition was brought about by a promise of marriage, for very obvious reasons: she must excuse the act to her family, to her friends and to society, and every consideration would impel her to attribute it to deception and betrayal," is such an instruction. *State v. Stemmons*, 544.
8. ———: **Corroboration of Promise: Preparations for Marriage.** There being positive testimony by others than prosecutrix that after the promise she had made preparations for marriage, and defendant having made no effort to show that they were not made nor to question their good faith, the trial court did not err in giving an instruction authorizing the jury to consider the preparations she had made for housekeeping as one of the corroborating circumstances of the promise of marriage, "although it has not been shown that defendant had knowledge of such preparations." *Ib.*

INSURANCE.

1. **Schedule of Rates: Judicial Review: Original Jurisdiction.** The Supreme Court does not have original jurisdiction to judicially review, upon evidence to be heard by a commissioner, the ruling of the Superintendent of Insurance in refusing an increase of rates according to a schedule filed with him by the rate-making representatives of all stock fire insurance companies doing business in the State. *State ex rel. Waterworth v. Harty*, 59.
2. **Life Insurance: Misrepresentation Statute: Simulated Applicant.** The statute (Sec. 6937, R. S. 1909) declaring that "no representation made in obtaining or securing a policy of insurance on the

INSURANCE—Continued.

life" of any citizen of this State "shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable," does not apply to a policy procured by one simulating the applicant. The statute was designed to lessen fraud, not to increase it. *Carter v. Ins. Co.*, 84.

3. ———: ———: ———: **Interpretation.** The words of the statute limit the misrepresentations (1) to those expressed in the application "made in obtaining and securing" a valid policy, and (2) to matters which "actually contributed" to the insured's death. It does not render immaterial a concealed condition which, had it been made known at the time of the applicant's examination, would have precluded the issuance of the policy. *Ib.*
4. ———: **Fraudulent Contract.** A policy of life insurance, issued upon an application made by one who personated the applicant, having been conceived in fraud, may, for that reason, in an action on the policy, be shown to be fraudulent and therefore invalid. *Ib.*
5. ———: ———: **Pleading: General Denial.** If nothing appears on the face of the petition to disclose the fraud on which the insurance contract was founded, and said contract is susceptible of formal proof without a showing as to its legality, the defense that no legal contract was made is not available under a general denial, but, to be available, the facts constituting its invalidity must be pleaded. *Ib.*
6. ———: ———: ———: **Joinder of General Denial With Special Defenses.** The joinder of a general denial, separately stated, with a special answer and cross-bill is expressly authorized by statute. *Ib.*
7. ———: ———: ———: **Cancellation: Conversion Into Equity.** If the special answer and cross-bill aver with sufficient certainty the invalidity of the contract sued on, and the cross-bill, after stating proper grounds for affirmative relief, contains a prayer for the cancellation of the contract, the action at law is thereby converted into one in equity, and the case is to be heard by the court and not by a jury. *Ib.*
8. **Statute: Unconstitutional Amendment: Prior Statute Restored.** If an existing statute be amended and reenacted, and be by the amendment rendered unconstitutional, the original statute, upon judicial declaration of invalidity of the amended statute, automatically comes into force again. *State ex rel. v. Clark*, 95.
9. **Rating Act: Unconstitutional Amendment of 1903: Restoration of Prior Statute.** The statute of 1898 declared that no fire insurance policy should contain a clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" or "making provision for a reduction of the loss or damage by reason of a failure to take out or maintain other insurance." In 1903 the statute was amended by adding a proviso that the inhibition "shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand or more inhabitants." *Held*, that, if the amendment had the effect to make the general inhibition a local or special law and for that or any other reason rendered the amended statute unconstitutional, the original act automatically came into force again, and if it was a valid enactment the general inhibition thereafter obtained. *Ib.*

INSURANCE—Continued.

10. ———: ———: **Repeal by Implication of Existing Statute: Inconsistency.** There is no inconsistency between the Insurance Rating Act of 1915 and Section 7023, Revised Statutes 1909, and consequently Section 7023 was not repealed by implication by said act. Section 7 of said act does say that a fire insurance company shall not "fix and charge any rate for fire insurance upon property in this State which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire," and Section 7023 declares that no insurance policy shall contain any clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" except in cities having one hundred thousand inhabitants or more; but there is a difference in the hazards and the amount of protection in such cities and in other parts of the State, and said Section 7, when the words "charges and credits" are read in the light of the next clause, means that it is only when the hazards and the protection against fire are the same that discrimination in rates is forbidden. *Ib.*
11. ———: ———: **Class Legislation.** Other things being equal classification in legislation on the basis of population is not unconstitutional. *Ib.*
12. ———: ———: **Filing of Rate With Superintendent: Mandamus.** The court refuses to compel, by its writ of mandamus, the Superintendent of Insurance to file, approve and permit the use on all standard policies of fire insurance of what is called the "Reduced Rate Contribution Clause" presented by petitioners, because the statutes do not authorize the same reduction in rates throughout the State. *Ib.*

INTEREST.

Defaulting County Treasurer: Suit on Bond. By force of the statute (Sec. 3771, R. S. 1909) the county treasurer and his sureties are liable for interest on all moneys belonging to the county appropriated by him, from the day he went out of office, at least, and not simply from the time suit was brought. *State ex rel. v. Blake-more, 697.*

INTOXICATED PASSENGER. See Railroads.

INTOXICATING LIQUORS.

1. **Delivery by Purchaser's Agent.** Section 2 of the Act of 1907 (Sec. 7227, R. S. 1909) made unlawful the transfer of the possession of intoxicating liquor from one person to another, in a Local Option county, when by the act of transfer there was no change of ownership. That section made the delivery to the purchaser by the purchaser's own agent a violation of its provisions. *State v. Koontz, 475.*
 2. ———: ———: **Direct Delivery to Purchaser by Carrier.** Section 7228, Revised Statutes 1909, is an exception to the operation of Section 7227, and relieves of its unlawful character the delivery of intoxicating liquor by one person to another in a Local Option county, where the deal, or order, is direct between the seller outside and the purchaser inside such county, and where the agency of no person who would profit by the traffic except as a common carrier intervenes between such seller and purchaser. *Ib.*
- 275 Mo.—49

JUDGMENT.

1. **Title to Land: Judgment as Estoppel.** In order that a judgment may have the effect of transferring title to land by estoppel, it must be pronounced by a court acting within the limits of a jurisdiction which authorizes it. If the court in pronouncing the judgment acted by virtue of a special or limited statutory jurisdiction, it can be upheld only when the plain letter of the law permits it. *Murphy v. Barron*, 282.
2. ———: ———: **Condemnation: Adverse Claimants to Award: Determination of Title.** Commissioners appointed by the court to assess damages in a condemnation proceeding begun by a railroad company estimated the value of a right-of-way one hundred feet wide through forty acres of land, at one hundred dollars. Plaintiff at the time was in possession claiming title, and defendant held a recorded deed made by the sheriff as a result of an execution sale under a judgment for taxes obtained against the plaintiff, who at the time the tax judgment was rendered was the owner and under sentence for a felony. The railroad company did not pay the money into court, but defendant upon the filing of the commissioners' report filed an interplea alleging he was the owner of the land and that plaintiff had no title or interest therein and asking that the money be awarded to him, and plaintiff later filed a like interplea alleging he was the owner and that defendant's deed was void and asking that the money be awarded to him. The trial court rendered judgment adjudging the defendant to be the owner of the land and ordering that the money be paid to him when it was paid into court. It was not paid into court, but defendant testified that it was paid to him. *Held*, that the judgment did not have the effect of transferring the title to defendant, but the contest related solely to the fund, and not to the land. *Held*, further, that the statutory proceeding for the fund was one *in rem* and jurisdiction cannot exist without the *res*, and the statute providing for an interplea only when the award is paid into court and that not having been done, the court had no jurisdiction to consider the title to the land or to award the fund to defendant. *Ib.*
3. **Allowance in Excess of Demand.** Where the Legislature appropriated \$25,000 to pay relators' demand, and they agreed with the Governor, prior to his approval of the act, to reduce their demand to \$20,000, and they asked for a writ to compel the State Auditor to issue them a warrant for \$20,000, and from a judgment against them in the circuit court they appeal, it would be inconsistent with the theory on which the case was tried and submitted in that court, for the Supreme Court to allow them \$25,000. *State ex rel. Kelly v. Hackmann*, 636.
4. **Entirety.** There can be but one final judgment and it must dispose of all parties; but the common-law rule that judgments are entireties is effective only in exceptional cases. *State ex rel. v. Blakemore*, 695.
5. ———: **Suit on Bond: Corrected as to Non-Liable Defendants.** Suit was brought by the county against a defaulting treasurer and his bondsmen. Two of the defendants, sued as heirs of a deceased surety, proved that said surety died before suit was brought on the bond, that his estate had been finally settled in the probate before the trial of the case and that no claim against the estate was made by the State or county, and they asked the court to direct a verdict in their favor, which request was refused. After verdict they moved for a new trial, whereupon the court set the verdict aside as to them, and rendered judgment in their favor

JUDGMENT—Continued.

and against the other defendants. *Held*, that the county might have sued any or all of the sureties, since their liability was both joint and several, and judgment against those shown to be liable was proper, and it being conceded that said heirs were not liable the judgment is not to be reversed because the trial court sustained their motion for a new trial. *Ib*.

JURY AND JURORS.

Impartiality. Where the talesman testified that his business relations with defendants were such that they might affect his verdict, that he preferred not to sit, that he felt embarrassed to sit as a juror against them, but that he would endeavor to do his duty and would exercise his judgment in returning a verdict according to the law and the evidence, the court did not act arbitrarily in rejecting him. *Oakley v. Richards*, 266.

JURISDICTION.

1. **Insurance: Schedule of Rates: Judicial Review: Original Jurisdiction.** The Supreme Court does not have original jurisdiction to judicially review, upon evidence to be heard by a commissioner, the ruling of the Superintendent of Insurance in refusing an increase of rates according to a schedule filed with him by the rate-making representatives of all stock fire insurance companies doing business in the State. *State ex rel. Waterworth v. Harty*, 59.
2. **Courts of Appeals: In Original Proceedings.** Where relief is sought other than in the recovery of the monetary judgment, the value of the right involved, estimated in money, constitutes the measure of jurisdiction of the appellate court to hear and determine an original writ. Jurisdiction of a court of appeals in prohibition and other original proceedings should be brought as nearly as possible into harmony with its appellate jurisdiction. A court of appeals is not authorized to issue such writs, or to exercise superintending control over inferior courts, in cases in which the Supreme Court has jurisdiction by appeal or writ of error. *State ex rel. v. Reynolds*, 113.
3. ———: ———: **Suit Against Corporation for Accounting, Etc.** Suit was brought by two stockholders, the par value of whose stock was \$8300, against the directors of a corporation, whose tangible property was \$25,000, charging deceit, fraud and waste in its management, and praying for an accounting and the appointment of a receiver. *Held*, that the Court of Appeals had no jurisdiction of a writ of prohibition to prevent the circuit judge from hearing and determining the bill in equity. *Ib*.
4. **Costs: Retaxed at Subsequent Term.** The clerk having upon the return of a verdict for damages for plaintiff upon one count of his petition in an action *ex delicto*, entered a judgment in which he taxed all the costs against defendant, as the statute required, a motion to retax costs filed by defendant at a subsequent term was too late, and the court had no jurisdiction to entertain it. The motion to retax must be filed at the term at which the judgment was entered. *Burton v. Railroad*, 185.
5. **Title to Land: Judgment as Estoppel.** In order that a judgment may have the effect of transferring title to land by estoppel, it must be pronounced by a court acting within the limits of a jurisdiction which authorizes it. If the court in pronouncing the judgment acted by virtue of a special or limited statutory juris-

JURISDICTION—Continued.

- diction, it can be upheld only when the plain letter of the law permits it. *Murphy v. Barron*, 282.
6. **Lewis County: Circuit Court at Canton.** In view of the previous decisions of this court it is *held* that the circuit court at Monticello has original jurisdiction of a suit to set aside a deed to land lying "east of the range line between ranges 6 and 7." *Barber v. Nunn*, 565.
 7. **Habeas Corpus: Constitutional Question.** Whether or not the statute under which a petitioner is imprisoned is constitutional, if he applies to a court of appeals for a writ of *habeas corpus* and that court proceeds to final action, whether by discharging him or remanding him to custody, that case is at an end. If not discharged, but is remanded to custody, his course, if he wishes the Supreme Court to determine the constitutionality of the statute and the consequent validity of his imprisonment under the statute, is to apply to that court for its writ. No way is provided, either by the Constitution or statutes, by which the Supreme Court can acquire jurisdiction in a *habeas corpus* proceeding otherwise than by the use of its own writ, directed to be issued either by itself or by one of its judges. *Ib.*
 8. ———: **Transfer from Court of Appeals to Supreme Court: Constitutional Question.** A court of appeals, having issued its writ of *habeas corpus* on behalf of a prisoner who alleges he is being illegally deprived of his liberty, has no authority, when the constitutionality of the statute under which he is held is properly assailed, to transfer the case to the Supreme Court, on the ground that the constitutionality of said statute is involved. The Supreme Court cannot by transfer acquire jurisdiction in a *habeas corpus* case. [Rule announced in *Moberly v. Lotter*, 266 Mo. 457, criticized.] *Ib.*

LACHES.

Divesting Title: Failure to Pay Taxes. In an action at law to determine title to land, in which no affirmative equitable relief is asked, plaintiff's cannot be divested of their title based on a patent from the Government, on the equitable doctrine relating to laches, merely because neither they nor their ancestor, the said patentee, had paid any taxes on said land at any time during the fifty-six intervening years since the patent was issued. *Bell v. George*, 17.

LANDS AND LAND TITLES.

1. **Trespass: Cutting Timber: Mere Licensee: Affirming Decision of Court of Appeals.** The decision of the Court of Appeals, 187 Mo. App. 373, holding that a certain consent decree between plaintiff and the apparent record owner of land gave to plaintiff something more than a personal license to cut, but a beneficial ownership in, the growing timber, and that therefore plaintiff could maintain an action of trespass against a mere stranger who cut and carried away parts of the timber, is not in conflict with a prior decision of the Supreme Court, but is correct. *Cooperage Co. v. Lumber Co.*, 4.
2. **Guardian and Curator: Appointment: Insane Person: No Notice.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the

LANDS AND LAND TITLES—Continued.

real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving *Hunt v. Searcy*, 167 Mo. 158.] *Shanklin v. Boyce*, 5.

3. ———: ———: ———: **Uselessness of Notice.** The suggestion that a notice of a lunacy inquiry to an insane person is useless and meaningless begs the question; for the issue to be tried is whether he is or is not insane, and to fail to give him notice on the ground that he is insane forestalls the very purpose of the inquest. *Ib.*
4. **Recovery of Property: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts, in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. *Ib.*
5. **Evidence: Champerty: Concealed Interest in Suit: Compulsory Testimony.** It is not prejudicial error to refuse to compel the attorney of record for plaintiffs to testify whether he has a deed from plaintiffs to the lands in suit, or a contract with them whereby he is to receive an interest in the land in case judgment is rendered in their favor, for he is just as much concluded by a judgment against them as he would be had he been joined as a party. *Bell v. George*, 17.
6. **Laches: Divesting Title: Failure to Pay Taxes.** In an action at law to determine title to land, in which no affirmative equitable relief is asked, plaintiffs cannot be divested of their title based on a patent from the Government, on the equitable doctrine relating to laches, merely because neither they nor their ancestor, the said patentee, had paid any taxes on said land at any time during the fifty-six intervening years since the patent was issued. *Ib.*
7. **Payment of Taxes: By Whom: No Showing: Presumption.** In the absence of evidence on the subject, the court has a right to presume that the record owner of the land paid the taxes from the time the patent was issued in 1859 up until it was sold for the taxes of 1889, although such record owner is not shown to have been at any time in actual possession. The burden is upon the purchaser at the tax sale to show that the record owner had not paid the taxes prior to his purchase. *Ib.*
8. **Plat Book: Uncertified: Relied On to Show Owner of Land.** An uncertified plat book, purporting to have been made by the proper United States land office, is not competent evidence for any purpose; and, although such plat book shows the lands were entered by a certain person in 1857, and the patents, which were not recorded in the county where the lands are situate, show they were issued to the assignee of said entryman in 1859, the Collector of the Revenue is not authorized to rely upon such uncertified plat book in ascertaining the owner of the land, where the statute requires the suit to be brought against the owner of the land. *Ib.*

LANDS AND LAND TITLES—Continued.

9. ———: **Ancient Document.** An uncertified plat book, which does not purport to be the original, is not competent evidence as an ancient document. *Bell v. George*, 17.
10. **Patent: Notice: Recorded in County.** It is not necessary that the patent, which named a certain person as patentee and described him as the assignee of certain military bounty warrants, should be recorded in the county where the land lies, in order to impart notice to the tax collector that such patentee or his heirs are the owners of the land. The Act of Congress required the patents to be recorded in the General Land Office, and when so recorded they imparted notice to the tax collector that the said certificate holder had assigned his land warrants to the patentee. *Ib.*
11. **Equitable Title: Entries Prior to Patents: Issued After Suit Brought.** Entry vests the equitable title in the entryman, and such title is sufficient to support a suit to quiet title; and where patents issued after the suit was brought are not in the record, it will be assumed on appeal, in aid of the judgment based on them, that they were issued on entries properly made prior to the institution of the suit. *Miller v. Buffon*, 35.
12. **Accretions: Saltatory: Intervening Creek.** If the accretions formed upon the old river bank and extended across in front of the mouth of a creek, they became at once a part of the land reaching the bank at that point, and a subsequent cutting by the creek of a channel through the accretions would not affect the title thereto; and if the evidence shows that in seasons of high water accretions would form along the old river bank, near and in front of the mouth of the creek, and the creek itself would be filled with silt for some distance back of its mouth, that as the high waters receded the creek would force its way through these accumulations, and that the deposits were made from the river bank outward, in the creek and on both sides of it, it cannot be ruled that the waters of the creek separated the accretions from the river bank. *Ib.*
13. ———: **Judgment: In Proportion to Frontage.** A judgment which awards accretions in proportion to the original river frontage prior to their formation, is in accord with well recognized legal principles. *Ib.*
14. **Trust Estate: Power of Trustee to Invest, Sell and Reinvest.** A clause of a will read: "I devise to my son J. H. Field, as trustee for my daughter Lucy B. Shields, ten thousand dollars, which I wish him to invest in some safe stock, or in any way he may think best, and to pay over for the use of my daughter Lucy, the yearly profits, which it may produce, but the principal to remain for the use of her children; in case my daughter Lucy dies leaving no children, the money to return and be equally divided between my sons." *Held*, that this language conferred upon the trustee power to invest, sell and reinvest, in personal or real estate; and when the trustee invested the fund in land, by a conveyance which named him as grantee and as trustee for the uses and purposes in the clause mentioned, a life estate in Lucy and remainder in the children was not so created that the trustee could not thereafter sell the land and invest the fund in other property. The power to sell and reinvest was not exhausted by the one investment in land. *Lawson v. Cunningham*, 138.
15. ———: ———: **Ultra Vires: Cure.** Even if it be conceded that, under said clause of the will, the trustee had no power to buy land,

LANDS AND LAND TITLES—Continued.

yet any subsequent act by which the wrong was righted and the trust fund returned intact into his hands was warranted and legally unobjectionable. *Ib.*

16. ———: **Substituted Trustee: Power to Sell Trust Land: Estoppel.** The *cestuis que trustent*, who, with actual notice, or with knowledge of facts demanding inquiry, have accepted the proceeds of a sale of land by a substituted trustee, have solemnly receipted to him for the full amount of the trust fund and have enjoyed and retain the fruits of such sale, cannot be heard in a court of conscience to say that the substituted trustee, under a clause of a will giving the original trustee power to invest the trust fund in real estate, had no power to sell the land, or that the court of the foreign State appointing him had no power to approve his sale of Missouri land; and whether such doctrine of preclusion be designated as *quasi-estoppel* or is more nearly akin to ratification or election, the result is the same—they cannot, under such circumstances, recover the land.
Held, by BOND, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the facts of the case do not show that the minor *cestui que trustent* shared in the proceeds of the sale of the trust property by the substituted trustee, or that they had notice that when it was sold the proceeds were invested in other real estate the purchase price of which, when it was sold, was divided among them, nor do they show that it was so invested, and consequently the doctrine of *quasi-estoppel* does not apply to them. *Ib.*
17. **Limitations: Fraudulent Conveyance: Grantor's Adverse Possession.** Title to land may, by the Statute of Limitations, be re-invested in a fraudulent grantor. A grantor by deed, whether in good faith and a valuable consideration, or to avoid the payment of his debts, may reacquire the fee-simple title to the lands conveyed, by adverse possession thereof for the statutory period of ten years. *Rottink v. Nagle*, 196.
18. ———: ———: ———: **Notice of Adverse Claim.** In order to make continuity of possession the basis of an adverse holding by the grantor or his heirs, after the delivery of his deed, he or they must, by words, acts or conduct, apprise the grantee that he is claiming title and possession of the land in defiance of the covenants of his deed; for until such notice is expressly or impliedly given to the grantee he will be entitled to rest secure upon the legal presumption that the continued possession by the grantor is in subservience to the grant. *Ib.*
19. ———: ———: ———: ———: **Sufficient Evidence.** Testimony that the owner of land, in order to save it from the effect of pending litigation, voluntarily made and recorded a deed to his father-in-law, and thereafter, for sixteen years and up to the time of his death, remained in exclusive possession, making improvements, discharging all existing mortgages, paying all the taxes, and claiming to be the owner, and that after his death his children conveyed the land to his wife and that she thereafter for the two years prior to bringing suit continued in possession, was sufficient to establish the possession of said grantor and his said wife as being adverse, continuous, hostile, notorious and under claim of title for the statutory period of ten years. *Ib.*
20. **Quieting Title: Pleading: Equitable and Legal Title: Relief.** In a suit brought under Sec. 2535, R. S. 1909, the petition may contain two counts, one asking for a determination of the title,

LANDS AND LAND TITLES—Continued.

and the other sounding in ejectment, and if defendant's title be found vulnerable in equity or void in law, plaintiff may have both possession and the removal of defendant's cloud. *Murphy v. Barron*, 282.

21. **Convict: Sale of Land for Taxes: Void Judgment.** A judgment for taxes obtained against an owner of land incarcerated in the Penitentiary is void and a sale under execution does not affect the legal title. The statute specifically declares that a convict "shall be deemed civilly dead" during the term of his sentence, but it also says he "is and shall be under the protection of the law" and provides for the appointment of a trustee to "prosecute and defend all actions commenced by or against the convict;" and if the State, instead of pursuing the course thus provided by the statute, proceeds against him directly for the taxes due from his land at a time when he cannot be haled into court, the judgment does not affect the legal title. *Ib.*

22. **Title to Land: Judgment as Estoppel.** In order that a judgment may have the effect of transferring title to land by estoppel, it must be pronounced by a court acting within the limits of a jurisdiction which authorizes it. If the court in pronouncing the judgment acted by virtue of a special or limited statutory jurisdiction, it can be upheld only when the plain letter of the law permits it. *Ib.*

23. ———: ———: **Condemnation: Adverse Claimants to Award: Determination of Title.** Commissioners appointed by the court to assess damages in a condemnation proceeding begun by a railroad company estimated the value of a right-of-way one hundred feet wide through forty acres of land, at one hundred dollars. Plaintiff at the time was in possession claiming title, and defendant held a recorded deed made by the sheriff as a result of an execution sale under a judgment for taxes obtained against the plaintiff, who at the time the tax judgment was rendered was the owner and under sentence for a felony. The railroad company did not pay the money into court, but defendant upon the filing of the commissioner's report filed an interplea alleging he was the owner of the land and that plaintiff had no title or interest therein and asking that the money be awarded to him, and plaintiff later filed a like interplea alleging he was the owner and that defendant's deed was void and asking that the money be awarded to him. The trial court rendered judgment adjudging the defendant to be the owner of the land and ordering that the money be paid to him when it was paid into court. It was not paid into court, but defendant testified that it was paid to him. *Held*, that the judgment did not have the effect of transferring the title to defendant, but the contest related solely to the fund, and not to the land. *Held*, further, that the statutory proceeding for the fund was one *in rem* and jurisdiction cannot exist without the *res*, and the statute providing for an interplea only when the award is paid into court and that not having been done, the court had no jurisdiction to consider the title to the land or to award the fund to defendant. *Ib.*

24. **Conveyance: Deed to Husband and Wife: Title in Survivor.** The owner of land and his wife conveyed his land to their daughter, and the daughter by another deed conveyed it to her father and mother. *Held*, that the last deed created an estate by the entirety in the father and mother, and upon the father's death the entire legal fee simple estate remained in the mother. *Burke v. Murphy*, 397.

LANDS AND LAND TITLES—Continued.

25. ———: **Intended as Mortgage: Presumption: Character of Proof.** The presumption of law is that a warranty deed regular in form is not a mortgage, but was intended to be what it purports to be, and it will not be decreed to be a mortgage unless the presumption is overcome by clear and convincing proof. *Ib.*
26. ———: ———: **No Debt.** A conveyance cannot be held to be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of an existing or future obligation. *Ib.*
27. ———: ———: **Bond for Support.** A deed from the owner of land to his daughter will not be decreed to be a mortgage, when construed in conjunction with a bond of even date executed by the daughter by which she obligated herself to support her father and mother during their lives and to permit them to remain upon and use the land as a home, and to pay \$1500 in case she defaulted in the performance of the obligation. There was no debt or obligation from the grantor to the grantee. *Ib.*
28. **Estate by Entirety: Claim of Homestead: Waiver.** A widow, who does not know that she is the owner of an estate by the entirety in the land, does not waive her fee simple title to the entire estate by claiming a homestead interest after her husband's death. *Ib.*
29. ———: **Estoppel: Prejudicial Misleading.** If the surviving widow, to whom and her husband a conveyance of an estate by the entirety had been made, by claiming a homestead in the land did not cause her husband's heirs to do or to refrain from doing anything which worked to their financial loss or prejudice, they cannot invoke the doctrine of equitable estoppel. *Ib.*
30. ———: **Fraudulent Conveyance: Raised by Party Without Interest.** The point that a deed was fraudulently procured by the grantees cannot be raised by persons who will in no wise be benefited if the deed is set aside. Where a valid warranty deed was made by a daughter to her father and mother, the children of the said father by a former marriage cannot raise the point that a deed by the surviving widow to her said daughter was fraudulently procured, since if it were set aside the title would not pass to them, but to the heirs of the grantor. *Ib.*
31. **Quieting Title: Character of Action: Pleading.** The character of an action brought under Section 2535, Revised Statutes 1909, is determined by the issues which the pleadings raise. If they present issues of equitable cognizance the action becomes a suit in equity, but a straight action under the statute, in the terms of the statute, is an action at law. *Koehler v. Rowland*, 573.
32. ———: ———: **Converted by Answer: Affirmative Equitable Relief.** Where the petition in a suit brought under Section 2535 states an action at law, an answer which sets up an equitable defense and asks affirmative relief converts the action at once into a suit in equity, so that the rules of equity apply; but the setting up of an equitable defense does not so convert the action unless affirmative equitable relief is prayed. *Ib.*
33. ———: ———: **Forfeiture: No Prayer for Affirmative Relief.** Where the petition follows Section 2535 substantially in the allegations of plaintiffs' rights and the defendants' claim, and prays the court to hear and determine all the rights, claims and interests whatsoever of the parties, to adjudge and decree that plaintiffs are

LANDS AND LAND TITLES—Continued.

the owners and to award them possession, and the answer, after stating reasons why a certain condition named in defendants' deeds should not work a forfeiture of their title, prays the court to adjudge that plaintiffs "have no right, title or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper," it does not contain a prayer for affirmative equitable relief, and the action is not, therefore, converted into a suit in equity, but remains as action at law. *Koehler v. Rowland*, 573.

34. ———: **Findings of Trial Court: Binding On Appeal.** If the suit brought under Section 2535 is an action at law, the findings of the trial court, if supported by substantial evidence, are binding on the appellate court. *Ib.*
35. **Conveyances: Condition: Occupation by Negroes.** Where the deed contained a condition that the property "shall not be sold, leased or rented to negroes," a breach is shown if a part of the building on the lot was leased to negroes, the intention of the restriction being to prevent negroes from coming on the premises as tenants; and the deeds must be interpreted in accordance with that manifest intention, as gathered from them as a whole. *Ib.*
36. ———: **Restrictive Sale or Use: Forfeiture.** Forfeiture is a harsh remedy and where a stipulation in a deed can be construed as a mere restrictive covenant and not a condition, so as to avoid a forfeiture, it will be so construed; and the question is to be determined from the language used, the situation of the parties, their relation to the subject of the transaction, and the object in view; but where the language is unmistakable, particularly where there is a provision for re-entry upon a breach of the condition, or where the right to re-enter is plainly implied, it is a forfeiture. *Ib.*
37. ———: **Sale or Lease to Negroes: Forfeiture.** The deed contained a condition that the "above described property shall not be sold, leased or rented to any negroes for twenty-five years from date hereof, and in event of such transfer, lease or rental before the expiration of said term, said property shall revert to grantor or sellers without process of law or equity." *Held*, to provide, in perfectly clear language, for a forfeiture on breach of condition and for a re-entry; and if not clearly expressed, forfeiture is implied in the language used. Such condition does not come within the rule prohibiting restraints upon alienation. *Ib.*
38. ———: ———: **Restraint Upon Alienation.** It is within the right and power of a grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. *Ib.*
39. ———: ———: **Public Policy.** A condition in a deed that the property is not to be "sold, leased or rented to negroes for twenty-five years" is not void as against public policy. The purpose of the restriction being to preserve the property, together with other property in the neighborhood, as a district unoccupied by negroes, it comes within the rule that conditions in deeds which prohibit the use of property for certain purposes, in order that it may become more desirable as places of residences for families, are valid. *Ib.*
40. ———: ———: **Perpetuities.** A stipulation in a deed whereby the title is to revert to the grantor upon entry for breach of a con-

LANDS AND LAND TITLES—Continued.

dition subsequent, is not within the rule against perpetuities. The courts will not refuse to enforce a forfeiture for a breach of a condition in a deed that the property was not to be "sold, leased or rented to negroes for twenty-five years from date," on the ground that the condition violates the rule against perpetuities, although the event upon which forfeiture might be declared might occur after every one in interest was dead and more than twenty-one years and ten months thereafter had elapsed. *Ib.*

41. ———: ———: **Change in Conditions: Question of Fact.** If the purpose of a condition in a deed declaring that the property "shall not be sold, leased or rented to negroes" can no longer be accomplished, owing to changed circumstances, such as the growth of the city and the present use by negroes of the whole neighborhood, and it would be oppressive and inequitable to give effect to such condition, it will not be enforced; but where the evidence as to such changed circumstances is conflicting, the appellate court will accept the finding of the trial court that there had been no such change, as conclusive in a law case, and will not refuse to enforce the condition on such ground. *Ib.*
42. **Quieting Title: Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him entitled to possession and to award a writ of possession in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession. *Ib.*
43. ———: ———: **Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to defendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property." *Ib.*
44. **Survey: Arbiters: Separate Report: Umpire.** A stipulation between two adjoining claimants to a parcel of land that the dividing line between their respective tracts should be ascertained by two surveyors, one to be chosen by each, and that if they could not agree a third, named in the stipulation, "shall decide all matters of difference between said two surveyors," did not require that the three should act together and join in one report, but the third could accept the parts of the line agreed upon by the two and proceed to survey the part not agreed upon by them, and file a separate report setting forth his finding. The stipulation did not require that there be one report concurred in by a majority, nor did it require that the third act jointly with the other two. *White v. Herminghausen, 687.*
45. ———: ———: ———: **Understanding of Parties.** Where there is any ambiguity as to the meaning of a stipulation, what the parties did under it, without objection, with the full knowledge of each other, indicates its meaning. *Ib.*

LEGISLATIVE POWER.

1. **Contract With State: Proof of Existence: Finding by Legislature.**

A finding by the Legislature of a fact upon which the right to enact a law depends is not to be further inquired into by the courts. So where an appropriation act appropriated a definite sum of money to private persons "in full payment of their claim against the State of Missouri for the plan submitted to the Board of Fund Commissioners for the sale of State Capitol bonds," and a contract for such a plan could under the statute have been made on behalf of the State with said board, it will be taken as true that an agreement was made between said persons and said board, under which the claim arose. And even if the court were to reserve the right to make an independent finding on the question of fact on the ground that the constitutionality of the act depends on a question of fact, the prior finding of the Legislature that such fact did exist would be treated as *prima-facie* true.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that the plan alleged to have been submitted was rendered voluntarily, with no implied or express obligation on the part of the board to pay therefor, if the services tendered were not accepted, and the Constitution prohibits the Legislature to appropriate money for a mere submitted plan. *State ex rel. v. Hackmann*, 636.

2. **——: Presumption of Validity: Judicial Question.** The courts will presume that the Legislature passed upon the validity of an agreement made by the board which was empowered to make it on behalf of the State, before it appropriated money to pay the obligation which it expressed, unless it is deemed a clear violation of the Constitution; but, nevertheless, the validity of the agreement is a judicial question, and the act making the appropriation to pay the claim will not be upheld if the agreement is one that the Constitution makes null and void. *Ib.*3. **——: Fund Commissioners: Power to Contract.** Section 11900. Revised Statutes 1909, which authorized and empowered the Board of Fund Commissioners "to enter into contracts, and to refund any part of the bonded indebtedness of the State," when read in connection with Section 11890, which authorized them to "perform all such acts and things as may be required of them by law," and the amendment of 1913 to Section 11900, which "authorized and empowered" said board "to enter into contracts and to refund," did not restrict their duties to refunding bonds, but authorized them to make contracts for the sale of Capitol bonds authorized by the Act of March 16, 1911.

Held, by WALKER, J., dissenting with whom BOND, C. J., and WOODSON, J., concur, that neither said statutes nor any other invested the board with authority to contract to pay for a plan to sell bonds voluntarily submitted to it and never accepted. *Ib.*

4. **——: Necessary Incidents of Power.** In view of the inhibition of the Constitution (Sec. 24, art. 4) that the General Assembly shall have no power "to pay or to authorize the payment of any claim hereafter created against the State . . . under any agreement or contract made without express authority of law," the power of the Board of Fund Commissioners to enter into a contract relating to the sale of the State's bonds must be strictly construed, and no such broad meaning of the word "necessity" as "convenient" and "proper" is to be tolerated; but as the board was given express authority to sell the Capitol bonds and power to enter into contracts, they were also given, as necessary to the exercise of such power, the further power to enter into an agree-

LEGISLATIVE POWER—Continued.

ment with private citizens to submit to them a plan to sell the bonds; and as the Legislature in an appropriation act recites that such plan was submitted, the act appropriating money to pay for the service rendered is not without express authority of law.

Held, by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that no appropriation act derives any operative force from its own terms alone, but something more, usually some statute, is necessary to authorize the withdrawal of money from the public treasury; and as the statute authorized the board to sell the bonds at the best advantage and required the proceeds to be applied exclusively to the building of a new capitol, furnishing the same and the acquirement of additional ground for a site, and the Constitution prohibits the Legislature to appropriate money in "payment of any claim . . . under any contract made without express authority of law," the Board of Fund Commissioners had no power to enter into a contract to pay for a plan to sell the bonds, and the General Assembly had no power to appropriate money to pay for a plan for their sale, voluntarily submitted by private persons and never accepted by the board, and no such power can be implied from the restricted language used, nor did any public necessity for the contract or the plan exist, and it is only when the public interest is involved that a necessity, as an incident to the power granted, can be said to exist. *Ib.*

5. ———: **Capitol Building Fund: Restricted Use.** The Capitol Building Fund having been increased from other sources than the proceeds of the Capitol bonds to an amount more than sufficient to discharge the obligation of a contract for a plan for selling the bonds, it cannot be held, as a fact, that an appropriation to pay said obligation is a diversion of the proceeds of the bonds, whose proceeds were by statute devoted to erecting a capitol, furnishing it and buying additional ground for a site; nor can it be held, as a matter of law, that the use of the proceeds to pay said obligation would be a diversion of them, since such payment was a necessary expense of floating the loan and therefore not an unlawful use of the proceeds. [WALKER, J., BOND, C. J., and WOODSON, J., dissenting.] *Ib.*
6. ———: **Grant to an Individual: Constitutional Inhibition.** The restriction of Section 46 of Article 4 of the Constitution inhibiting the Legislature from granting public money to an individual, is laid upon gratuitous grants. It does not prohibit payment for services rendered the State; for instance, it does not prohibit the Legislature to appropriate money to pay private citizens for a plan submitted to the Board of Fund Commissioners to sell a large issue of bonds. *Ib.*
7. ———: **Certification of Claim.** The State Capitol Commission was not entrusted with the sale of Capitol bonds, nor did it have anything to do with claims or demands incident to their sale, and consequently it was not necessary that it allow or certify a claim by private persons for a plan to sell the bonds submitted to the Board of Fund Commissioners. *Ib.*

LEGISLATURE.

Legislative Power: How Far Plenary. The Legislature of a State, unless fettered by either the State or Federal Constitution, is vested, in its representative capacity, with the plenary power of the people, and can legislate at will. In consequence, no legisla-

LEGISLATIVE POWER—Continued.

tive act will be adjudged to be repugnant to the Constitution if any reasonable doubt of its constitutionality exists in the judicial mind. *Wire Co. v. Wollbrinck*, 339.

LICENSEE. See *Trespass*.

LIEN.

Mechanic's Lien: Subcontractor: Extra Work. The contract between the contractor and subcontractor called for the payment of a lump sum of \$7200 for labor and material to be furnished, and the subcontractor received \$6781.60 as a credit, leaving \$418.40 due him under the original contract; but after the work was commenced the contractor changed the plan of the work and ordered the subcontractor to furnish additional labor and material to the amount of \$400.35, which sum, added to the \$418.40 due under the original contract, made \$818.75, for which he had judgment against the contractor. *Held*, that the judgment for the entire sum of \$815.75 should be decreed a lien on the building, and the majority opinion of the Court of Appeals (190 Mo. App. 340) decreeing only the \$418.75 to be a lien is disapproved, and the reasoning and conclusions of the dissenting opinion (190 Mo. App. 352) that the subcontractor is entitled to a lien for the whole balance due is approved. *Parker v. Milling Co.*, 1.

LIMITATIONS.

1. **Fraudulent Conveyance: Grantor's Adverse Possession.** Title to land may, by the Statute of Limitations, be reinvested in a fraudulent grantor. A grantor by deed, whether in good faith and a valuable consideration, or to avoid the payment of his debts, may reacquire the fee-simple title to the lands conveyed, by adverse possession thereof for the statutory period of ten years. *Rottink v. Nagle*, 196.
2. ———: ———: **Notice of Adverse Claim.** In order to make continuity of possession the basis of an adverse holding by the grantor or his heirs, after the delivery of his deed, he or they must, by words, acts or conduct, apprise the grantee that he is claiming title and possession of the land in defiance of the covenants of his deed; for until such notice is expressly or impliedly given to the grantee he will be entitled to rest secure upon the legal presumption that the continued possession by the grantor is in subservience to the grant. *Ib.*
3. ———: ———: ———: **Sufficient Evidence.** Testimony that the owner of land, in order to save it from the effect of pending litigation, voluntarily made and recorded a deed to his father-in-law, and thereafter, for sixteen years and up to the time of his death, remained in exclusive possession, making improvements, discharging all existing mortgages, paying all the taxes, and claiming to be the owner, and that after his death his children conveyed the land to his wife and that she thereafter for the two years prior to bringing suit continued in possession, was sufficient to establish the possession of said grantor and his said wife as being adverse, continuous, hostile, notorious and under claim of title for the statutory period of ten years. *Ib.*
4. **Gift: Five Years.** An action of assumpsit brought by a sister in January, 1914, against the donor's administratrix, for the value of bonds given to her by her brother in October, 1907, and by him borrowed from her in March, 1908, and never returned, where the evidence shows the donor and donee had mutual dealings in

LIMITATIONS—Continued.

regard to the bonds up to and including 1911, was not barred by the five-year Statute of Limitations. *Townsend v. Schaden*, 227.

LOCAL OPTION.

1. **Intoxicating Liquor: Delivery by Purchaser's Agent.** Section 2 of the Act of 1907 (Sec. 7227, R. S. 1909) made unlawful the transfer of the possession of intoxicating liquor from one person to another, in a Local Option county, when by the act of transfer there was no change of ownership. That section made the delivery to the purchaser by the purchaser's own agent a violation of its provisions. *State v. Koontz*, 475.
2. ———: ———: **Direct Delivery to Purchaser by Carrier.** Section 7228, Revised Statutes 1909, is an exception to the operation of Section 7227, and relieves of its unlawful character the delivery of intoxicating liquor by one person to another in a Local Option county, where the deal, or order, is direct between the seller outside and the purchaser inside such county, and where the agency of no person who would profit by the traffic except as a common carrier intervenes between such seller and purchaser. *Ib.*

LUNACY INQUIRY. See *Insanity*.

MANDAMUS.

Insurance: Rating Act: Filing of Rate With Superintendent. The court refuses to compel, by its writ of mandamus, the Superintendent of Insurance to file, approve and permit the use on all standard policies of fire insurance of what is called the "Reduced Rate Contribution Clause" presented by petitioners, because the statutes do not authorize the same reduction in rates throughout the State. *State ex rel. v. Clark*, 95.

MATERIALMAN'S LIEN. See *Liens*.

MONOPOLY, PUBLIC. See *Public Utilities*.

MORTGAGES AND DEEDS OF TRUST.

1. **Warranty Deed: Intended as Mortgage: Presumption: Character of Proof.** The presumption of law is that a warranty deed regular in form is not a mortgage, but was intended to be what it purports to be, and it will not be decreed to be a mortgage unless the presumption is overcome by clear and convincing proof. *Burke v. Murphy*, 397.
2. ———: ———: **No Debt.** A conveyance cannot be held to be a mortgage unless it is made for the purpose of securing the payment of a debt or the performance of an existing or future obligation. *Ib.*
3. ———: ———: **Bond for Support.** A deed from the owner of land to his daughter will not be decreed to be a mortgage, when construed in conjunction with a bond of even date executed by the daughter by which she obligated herself to support her father and mother during their lives and to permit them to remain upon and use the land as a home, and to pay \$1500 in case she defaulted in the performance of the obligation. There was no debt or obligation from the grantor to the grantee. *Ib.*

MOTION FOR NEW TRIAL.

1. **Reasons for Ruling: Facts Established.** Where the motion for a new trial does not allege that the court improperly found any fact, and designates as the only error that the judgment for defendant was for the wrong party, it will be assumed on appeal from an order granting a new trial that the disputed facts were found in appellant's favor, and the question for determination is one of law, that is, whether on the facts found the judgment was against the law. *Rose v. Road District*, 590.
2. **Judgment: Entirety.** There can be but one final judgment and it must dispose of all parties; but the common-law rule that judgments are entireties is effective only in exceptional cases. *State ex rel. v. Blakemore*, 695.
3. ———: ———: **Suit on Bond: Corrected as to Non-Liable Defendants.** Suit was brought by the county against a defaulting treasurer and his bondsmen. Two of the defendants, sued as heirs of a deceased surety, proved that said surety died before suit was brought on the bond, that his estate had been finally settled in the probate court before the trial of the case and that no claim against the estate was made by the State or county, and they asked the court to direct a verdict in their favor, which request was refused. After verdict they moved for a new trial, whereupon the court set the verdict aside as to them, and rendered judgment in their favor and against the other defendants. *Held*, that the county might have sued any or all of the sureties, since their liability was both joint and several, and judgment against those shown to be liable was proper, and it being conceded that said heirs were not liable the judgment is not to be reversed because the trial court sustained their motion for a new trial. *Ib.*

MOTION TO ELECT.

A refusal to permit defendant leave to file a motion to compel plaintiff to elect between certain causes of action stated in her petition is not error, if she announced that she elected to stand on certain allegations, and the instructions were based on them, and another was given withdrawing all the others from the jury. *Oakley v. Richards*, 266.

MOVING PICTURE THEATRE. See *Theatres*.

NATURAL RIGHT TO PROPERTY. See *Inheritances*.

NEGLIGENCE.

1. **Intoxicated Passenger: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 438 (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicating liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the names of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitutions. *Lige v. Railroad*, 249.

NEGLIGENCE—Continued.

2. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The Act of 1909, page 438 (Secs. 4710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United States which prohibit the enforcement of any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States. *Ib.*
3. ———: ———: **Common Law Right of Action Nevertheless.** Notwithstanding the fact that the statute upon which plaintiff grounds his cause of action for personal injuries is unconstitutional, yet if the petition, independent of that plea, states a good cause of action at common law, a demurrer to the evidence should not be sustained, if it warrants a submission of the case to the jury upon the common-law theory. *Ib.*
4. ———: **Injury to Fellow Passenger: Liability of Carrier.** A common carrier is bound to exercise the utmost practicable care for the safety of its passengers, to safely transport them, and to protect them while in transit from violence and insults from all persons on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damages therefor; but the duty does not amount to an absolute guaranty that a passenger will be transported with absolute safety or that he will not be insulted or injured by an intoxicated fellow-passenger. The rule means that the conductor and other trainmen must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for injuries inflicted by one passenger upon another, if in the exercise of that degree of care the assault or injury is not to be foreseen. *Ib.*
5. ———: ———: ———: **Sudden and Unexpected Assault.** A common carrier is not liable in damages to a passenger for injuries resulting from a sudden assault by another intoxicated passenger, who, without any previous threat or verbal altercation, who was not previously boisterous or insulting in his talk or conduct and who gave no evidence that he was intoxicated except that he was talking generally and having a jolly good-time, suddenly seized an iron wrench and struck on the head the other passenger, who was a total stranger to him. *Ib.*
6. **Moving Picture Theatre: Duty of Owner to Patrons.** It is the duty of the owners and operators of a moving-picture theater to see that the place to which they invite their patrons is reasonably safe for use for the purposes for which it was designed. *Oakley v. Richards*, 266.
7. ———: **Step-Off in Floor: Absence of Light.** It is a matter of common knowledge that a four-inch depression in a floor is suf-

NEGLIGENCE—Continued.

sufficient to cause one to fall who, in the absence of light and knowledge of the depression, steps into or upon the edge of it. So that where the floor upon which were the seats of the moving picture theater was four inches above the aisle, which fact plaintiff did not know, and there was not sufficient light to enable her to see the depression, which brought about her fall, the concurrence of the two constituted negligence, and the jury was warranted in finding that her fall was due to her inability to see the step-off on account of the darkness. *Oakley v. Richards*, 266.

8. ———: ———: **Contributory.** Patrons having been invited to enter and leave the moving-picture theater at will during performances, it cannot be said, as a matter of law, that a patron, seeing others using the aisle, which was four inches below the floor on which the seats rested, was guilty of contributory negligence in falling, in the absence of knowledge of the step-off and of sufficient light to enable her to see it, to apprehend that the usual path of exit contained an unsafe place or pitfall. The question was one for the jury. *Ib.*
9. ———: **Floor Level: Inequalities Upon Permission: Inspection.** Where the ordinance declared that "no steps shall be permitted in any aisle or in any part of the auditorium floor" of a theater "except by written permission" of named officials, permission cannot be implied from a mere inspection by such officials. *Ib.*
10. ———: **Validity of Ordinance: Steps in Aisle: Permission of Officials.** An ordinance prohibiting steps in the aisle or on any part of the auditorium floor of a moving-picture theater "except by written permission" of designated officials does not vest an arbitrary power in said officials and is not for that reason invalid. In case a city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from a designated official; and a city may lawfully prohibit absolutely inequalities in floor levels in darkened theaters, and matters of detail in enforcing ordinances otherwise valid may be left to designated officials. *Ib.*
11. **Picture Theater: Step-Off in Aisle: Assumption of Risks.** Where the petition charged that the aisle of a moving-picture theater was four inches lower than that part of the floor on which the seats rested, that such step-off was in violation of a designated ordinance, that such construction was negligence, that plaintiff had no knowledge of such step-off and that there was not sufficient light to enable her to see it, an instruction on the assumption of risks which ignores such allegations is properly refused. *Ib.*
12. ———: ———: **Custom: Contrary to Ordinance.** Custom is no defense to a violation of positive law. Where plaintiff was injured by falling as she attempted to leave her seat in a moving-picture theater, whose aisle was four inches below the auditorium floor, and which construction was in violation of a city ordinance, it was not error to instruct the jury that the fact that the owners of other theaters permitted similar inequalities in the floor constituted no defense. *Ib.*
13. ———: ———: ———: **Proof.** Evidence that about one out of ten theaters in the city had steps from the auditorium floor to the aisle does not prove a customary construction. *Ib.*
14. ———: **Difference in Floor Levels: Practicable Construction: Expert Testimony.** It was not error to permit an expert to tes-

NEGLIGENCE—Continued.

- tify that it was practicable to overcome differences in floor levels in theaters by gradients and inclined planes. It cannot be said as a matter of law that such methods of construction are so practicable that a jury are as capable of drawing correct conclusions on the subject as is an expert. *Ib.*
15. **Obstruction of Street by Plaintiff.** The fact that the plaintiff maintained a naptha tank in the street in violation of a city ordinance does not of itself prevent recovery by him for damages when the railroad company backed a freight car off the end of a switch track in the street, which passed on to and struck the tank, causing the naptha to take fire and thus burning his factory in connection with which the naptha was used. Unless the illegal obstruction was the proximate and efficient cause of the injury it does not totally bar recovery, nor relieve the railroad company for at least nominal damages for the negligent injury done to the tank. *Kupferle Co. v. Term. Ry. Co.*, 451.
16. ———: **Unforeseen Accident.** A party charged with negligence may be held liable for anything which, after the injury is complete, appears to be a natural or probable consequence of his negligent act. The fact that the trainmen, who backed the freight car off the end of a switch track and on to a tank ten feet beyond the end, did not know that it contained an explosive, does not protect the railroad company from damages caused by the explosion. *Ib.*
17. **Contributory: Maintenance of Naptha Tank.** Whether or not the plaintiff foundry company was guilty of negligence in maintaining a tank containing naptha, which it used in connection with its factory, in the street, against which the trainmen shoved a freight car, after running it off the end of the switch track in the street, causing an explosion and a fire in the factory, and in covering it with a wooden box painted red, with no sign to indicate that naptha was kept in it, is a question for the jury, and it cannot be said as a matter of law that the keeping of the tank in said manner and at said place was negligence *per se*. *Ib.*
18. **Explosive: Violation of Ordinance.** The keeping of explosives in violation of a statute or ordinance is negligence. *Ib.*
19. **Directed Verdict: Appellate Rule.** The appellate court will not interfere with the action of the trial court in refusing to direct a verdict for defendants where there was substantial evidence to support a verdict for plaintiff. *Laughlin v. Railway*, 459.
20. ———: ———: **All Evidence Considered.** The probative force of the substantial evidence necessary to sustain the verdict rendered for plaintiff is not to be tested by that adduced by him alone, although in passing on a demurrer thereto every reasonable inference deducible therefrom is to be taken as true; but it also may be aided by such of defendant's evidence that helps to make out plaintiff's case. *Ib.*
21. ———: **Inferences from Proven Facts: Proximate Cause.** The testimony of plaintiff, a brakeman of a freight train which had stopped to take water, was that after it had started and was running at a rate of five to seven miles per hour he attempted to swing himself upon a car by grasping an iron stirrup and was thereby lifted off the ground and while his feet were in mid-air they struck an obstacle, making a sound as of pieces of iron striking together; that the impact broke his hold on the stirrup, causing him to fall; and that when he recovered from a condition of unconscious-

NEGLIGENCE—Continued.

- ness he saw a keg of spikes near his feet. On the day of the accident the track at the point had been repaired, by taking out old and putting in new ties, and spikes had been pulled from the old ties, and inferably placed in the keg. *Held*, that the jury were authorized in making the inference that the railroad trackmen had left the keg at the place where it was found after the accident, and that under the facts proved and circumstances shown the plaintiff's fall was caused by his legs striking the keg. *Laughlin v. Railway*, 459.
22. ———: **Proximate Cause: Question for Jury.** The determination of the proximate cause of an injury, whether it be the original negligence of one party or the intermediate negligence of another, is ordinarily one for the jury. *Ib.*
23. **Character of Evidence.** Direct evidence to establish negligence is not required, but it may be sufficiently shown by facts and circumstances. The proof must do more than raise a conjecture as to the cause of the injury; it must show with reasonable certainty that the cause for which defendant is sought to be held liable produced the injury; but it is only when the evidence with all the inferences that the jury may reasonably draw therefrom is insufficient to support a finding for plaintiff, that the court is authorized to direct a verdict for defendant. *Ib.*
24. **Contributory: Instruction: Burden: Restriction to Plaintiff's Evidence.** Under the Federal Employers' Liability Act an instruction for plaintiff which places upon the defendant the burden of proving contributory negligence is not error. Nor under the circumstances of this case can defendant complain that to such instruction was not added the clause: "unless the jury find from plaintiff's own evidence and the witnesses introduced by him that he was guilty of contributory negligence." The instruction given did not specify what things were done or known by plaintiff, and if defendant desired an amplification or qualification of it in order to present its contention to the jury, it was its duty to ask a proper instruction, appropriate to the evidence and pleading, presenting that view. *Ib.*
25. ———: ———: **Pleading: Proof.** If contributory negligence is not pleaded an instruction presenting it as a defense should not be given; and if pleaded and there is no evidence to support the plea, no instruction on the subject should be given. Where defendant's only plea of contributory negligence was that, if plaintiff was injured, it was the result of his own negligence in attempting to climb on a moving freight train without properly using the stirrup, an instruction declaring that he was guilty of contributory negligence if he did not intelligently use the means at hand to ascertain if there were any pitfalls or obstacles on the right-of-way against which his feet might strike as he attempted by grasping the stirrup to mount the moving car, would have been improper. *Ib.*
26. **Obstacle Beside Track.** Where it is necessary for a brakeman of a freight train, in order to mount a moving car, to grasp an iron stirrup or hand-hold while running along-side the car, he is authorized in assuming that the right-of-way is clear of obstructions, such, for instance, as a keg of railway spikes. *Ib.*
27. **Verdict: Excessive: \$10,772: Simulated Injuries.** Where there is substantial evidence that plaintiff's injuries resulting from the accident were a bruise on the thigh and back, hydrocele of the right testicle, rupture of a ligament of the cervical vertebrae

NEGLIGENCE—Continued.

resulting in the depression of the seventh vertebra, an injury to the spinal cord, paralysis of the lower limbs involving the motor and sensory nerves, a subluxation of the lumbar vertebrae, anesthesia of the muscles and nerves of the back extending from the shoulders to the waist line, a loss of the reflexes of the knees and feet, traumatic neurasthenia, and that the injuries are progressive and permanent, the court cannot say, even though other medical experts gave contradictory testimony, that the injuries are feigned, or that a verdict for \$10,772 is excessive. *Ib.*

28. ———: **Federal Court Rule.** In cases coming within the purview of the Federal Employers' Liability Act, it is in harmony with the purposes of the statute to adopt the measure of damages sanctioned by the Federal courts, which is that no limitation is placed by the statute on the amount that may be recovered, except that of the damages actually sustained. *Ib.*
29. ———: **Measure of Damages: Other Cases as Guide.** On account of the difference in the facts, there can be no hard-and-fast rule for the measure of damages in a personal injury case. A similarity in the awards in cases of like injuries may serve as a general guide, but it furnishes no exact rule by which the damages may be estimated in a given case. *Ib.*
30. **Expert Testimony: Conclusion.** Where the hypothesis is based upon an established fact that plaintiff received certain injuries on a given date, it is not prejudicial error to permit the expert witness to testify that the condition will be progressive and he will be rendered helpless, if the testimony is followed by an instruction that "the opinions of expert witnesses neither establish nor tend to establish the truth of the facts upon which they are based," and similar testimony was admitted without objection. *Ib.*
31. ———: ———: **Waiver.** A litigant will not be heard to complain of the admission of advisory expert testimony over his objection, where evidence of the same tenor has been admitted without his objection. *Ib.*

NOTICE.

1. **Guardian and Curator: Appointment: Insane Person.** The appointment by the probate court of a guardian of the person and curator of the estate of an insane person, without notice of the proceedings to such person, is void; and the sale of the real estate of an insane person by a curator appointed without such notice is likewise void. That part of the statute (Sec. 476, R. S. 1909) which permits the court to adjudge a person insane and to appoint a curator or guardian after having "spread upon its record of its proceedings the reason why such notice or attendance was not required" does not constitute due process of law, is unconstitutional and void. [Following and approving *Hunt v. Searcy*, 167 Mo. 158.] *Shanklin v. Boyce*, 5.
2. ———: ———: **Uselessness of Notice.** The suggestion that a notice of a lunacy inquiry to an insane person is useless and meaningless begs the question; for the issue to be tried is whether he is or is not insane, and to fail to give him notice on the ground that he is insane forestalls the very purpose of the inquest. *Ib.*
3. **Patent: Recorded in County.** It is not necessary that the patent, which named a certain person as patentee and described him as the assignee of certain military bounty warrants, should be recorded in the county where the land lies, in order to impart

NOTICE—Continued.

- notice to the tax collector that such patentee or his heirs are the owners of the land. The Act of Congress required the patents to be recorded in the General Land Office, and when so recorded they imparted notice to the tax collector that the said certificate holder had assigned his land warrants to the patentee. *Bell v. George*, 17.
4. **Injunction: Prior Notice.** The giving of notice of an application for temporary injunctive relief and the appointment of a receiver for a corporation is not a necessary precedent condition in all cases. Where the need is crying notice is not a prerequisite. *State ex rel. v. Reynolds*, 113.
 5. **Of Adverse Claim: By Grantor of Land: Implied from Acts.** In order to make continuity of possession the basis of an adverse holding by the grantor or his heirs, after the delivery of his deed, he or they must, by words, acts or conduct, apprise the grantee that he is claiming title and possession of the land in defiance of the covenants of his deed; for until such notice is expressly or impliedly given to the grantee he will be entitled to rest secure upon the legal presumption that the continued possession by the grantor is in subservience to the grant. *Rottink v. Nagle*, 196.
 6. **Public Road: Certified Copy of Affidavit.** An objection that a certified copy of the affidavit filed in the county court showing proper posting of notices of the intended application for the establishment of a proposed public road is not the best evidence and should not have been admitted in evidence in the trial on appeal in the circuit court until the loss of the original was accounted for, made for the first time in the Supreme Court, will not be ruled. In *matter of Critzer*, 514.

OFFICERS.

Superintendent Of Schools: Traveling Expenses: Outside of State.

Since the Legislature appropriated money to pay the traveling expenses of the office of State Superintendent of Public Schools, and the statute prescribing his duties says he shall have power "to in every way elevate the standard and efficiency of the instruction given in the public schools of the State" and further says that "all moneys reasonably expended in the execution of these duties shall, upon due proof," be allowed and paid by the State, the question of the necessity and expediency of incurring expense for this purpose, in the absence of statutory restriction, is to be determined by the Superintendent, and not by the State Auditor; and in consequence a reasonable expense account incurred by the Superintendent in railroad fares and hotel accommodations in attending an annual meeting, at Portland, Oregon, of the National Education Association, composed of superintendents of public schools in all the States and of leading teachers and educators throughout the country and organized to promote, foster and encourage the cause of public education generally, should, upon the Superintendent's approval, be audited by the State Auditor for payment out of the moneys so appropriated, as an expense useful and properly to be incurred in the performance of the Superintendent's statutory duty "to elevate the standard and efficiency of the instruction given in the public schools of the State."

Held, by WALKER, J., dissenting, that the statutes contain no intimation of a requirement that the State Superintendent shall attend educational associations, and without a statute declaring, either in express terms or by reasonable implication, it to be his duty to attend national educational associations,

OFFICERS—Continued.

the Legislature itself could not appropriate money to pay his traveling expenses in attending them. *State ex rel. Lamkin v. Hackmann*, 47.

OVERFLOW WATER. See *Damages*, 15 and 16.

PAYMENT. See *Accord and Satisfaction*.

PAYMENTS, APPLICATION.

Defaulting County Treasurer: Commingling Funds. Where the county treasurer did not deposit the funds in his hands separately, but mingled them all in depositing them, the trial court did not err in instructing the jury, in a suit on his bond, that if he was indebted to the county and paid it a less sum than the total due and made no application of the payment to particular funds, the county had the right to apply the payment as it deemed best, and the bringing of the suit upon the bond "is evidence which will authorize you to find there was an application of the payment to his indebtedness, if any, to all funds other than those covered by the bond sued on," no question having been raised by the sureties at the trial as to whether the county court ordered the suit brought. If the treasurer failed to direct the application of the fund, the county had the right to do so; and the bringing of the suit on the bond for the whole deficiency would have bound the county, as an application of payment, in any other proceeding, and was substantial evidence of the county's intention to make the application to the funds mentioned in the instruction. *State ex rel. v. Blakemore*, 697.

PART PAYMENT. See *Accord and Satisfaction*.

PERPETUITIES.

Restraint on Alienation for Twenty-five years. A stipulation in a deed whereby the title is to revert to the grantor upon entry for breach of a condition subsequent, is not within the rule against perpetuities. The courts will not refuse to enforce a forfeiture for a breach of a condition in a deed that the property was not to be "sold, leased or rented to negroes for twenty-five years from date," on the ground that the condition violates the rule against perpetuities, although the event upon which forfeiture might be declared might occur after every one in interest was dead and more than twenty-one years and ten months thereafter had elapsed. *Koehler v. Rowland*, 573.

PLAT BOOK.

1. **Uncertified: Relied On to Show Owner of Land.** An uncertified plat book, purporting to have been made by the proper United States land office, is not competent evidence for any purpose; and, although such plat book shows the lands were entered by a certain person in 1857, and the patents, which were not recorded in the county where the lands are situate, show they were issued to the assignee of said entryman in 1859, the Collector of the Revenue is not authorized to rely upon such uncertified plat book in ascertaining the owner of the land, where the statute requires the suit to be brought against the owner of the land. *Bell v. George*, 17.
2. **—: Ancient Document.** An uncertified plat book, which does not purport to be the original, is not competent evidence as an ancient document. *Ib.*

PLAT BOOK—Continued.

3. **Street and Lots: Plats and Measurements: Conflict.** By Section 6573, Revised Statutes 1879, the platting of ground had the same legal effect to dedicate to public use the streets and alleys therein described as would a conveyance directly to the city; and when the owners of the lots and blocks fronting on said streets and alleys as shown by the plat sell them to third parties, the title to the streets and alleys cannot be questioned by the city or by the purchasers of other lots, nor can the rights of the purchasers of lots to access to the streets and alleys as shown by the plat be questioned by purchasers of other lots embraced within the plat. [Following *Laddonia v. Day*, 265 Mo. 383.] *Wright v. City of Joplin*, 213.
4. ———: ———: ———: **Plat Determinative.** When the plat of an addition has been executed and filed in conformity with the statute, the streets and alleys indicated by the plat as actually fitted to and laid out on the land, and not as indicated by calls of measurements, courses and distances as shown by field notes of the surveyor, became vested absolutely in the city for the use of the public. If there is a conflict between said plat and the measurements of a survey—if the plat designated certain streets and they were actually laid off on the surface of the ground by the dedicators as indicated by it and as subsequently used by the public, and lots were sold and improved in conformity to stakes and boundary lines, which also were in conformity to the plat, although the field notes attached to and filed with the plat described the tract as 1320 feet square, when as shown by the plat the tract was 1325 feet east and west, and as shown by a subsequent survey was 1300 feet on the north line thereof and 1299.7 feet on the south line—the plat must prevail, and the city cannot change the lot lines as shown by it, nor re-establish the streets and alleys in accordance with the actual measurements. *Ib.*

PLEADING.

1. **Fraudulent Contracts: Pleading: General Denial.** If nothing appears on the face of the petition to disclose the fraud on which the insurance contract was founded, and said contract is susceptible of formal proof without a showing as to its legality, the defense that no legal contract was made is not available under a general denial, but, to be available, the facts constituting its invalidity must be pleaded. *Carter v. Ins. Co.*, 84.
2. ———: **Joinder of General Denial With Special Defenses.** The joinder of a general denial, separately stated, with a special answer and cross-bill is expressly authorized by statute. *Ib.*
3. ———: **Cancellation: Conversion Into Equity.** If the special answer and cross-bill aver with sufficient certainty the invalidity of the contract sued on, and the cross-bill, after stating proper grounds for affirmative relief, contains a prayer for the cancellation of the contract, the action at law is thereby converted into one in equity, and the case is to be heard by the court and not by a jury. *Ib.*
4. **Accounting.** Pleadings for an accounting are liberally construed, and where the allegations substantially state a case a demurrer to the petition should be overruled. The bill must be interpreted by employing in its aid all reasonable inferences from the facts stated and all implications and intendments its terms will afford. In support of any relief competent for the court to grant. *State ex rel. v. Reynolds*, 113.

PLEADING—Continued.

5. ———: ———: **Profit on Company Stock.** An allegation in the petition of stockholders against the president and directors of a corporation that the president bought 300 shares of its stock from a stockholder at \$40 a share for the use of the company and sold it at \$60 per share, at a profit of \$2000 to himself, states a specific and sufficient ground for an accounting. *Ib.*
6. ———: ———: **False Entry on Books.** A charge by a stockholder in his petition that the president and directors purchased certain articles for the corporation at \$17,000 and then caused entries to be made on the books showing an expenditure of \$22,000 on that account, will authorize an accounting. *Ib.*
7. ———: **Removal of President of Corporation.** A bill by a stockholder which seeks to have the president of the corporation removed on the ground that he draws an exorbitant salary, stating facts which tend to show that his salary is exorbitant, is not demurrable. *Ib.*
8. **Liberal Construed.** The common-law-rule that pleadings must be strictly construed against the pleader has, by statute, been either modified or abrogated in favor of liberal construction. Even upon demurrer it is permissible to infer all facts from those expressly stated that may be implied by fair and reasonable intendment. *State ex rel. v. Long, 169.*
9. **Consolidated School District: Answer: Exact Date of Filing of Petition.** Where the information in a *quo warranto* contains only the general charge that the proceedings "were irregular, contrary to the requirements of the law and void," an averment in the answer that a petition for the establishment of the consolidated school district was filed with the county superintendent in January, 1916, is sufficiently exact upon demurrer, even in view of the rule that the answer of respondents must contain definite denials of the allegations of the information and affirmative declarations of their rights. The material averment of the filing having been made, objection to the failure to allege the exact date should be made by a motion to make more definite and certain. *Ib.*
10. ———: ———: **Meeting of Voters.** Where the answer avers that ten notices of the time, place and purpose of a meeting of the voters of the proposed consolidated school district and five plats of its boundaries were posted for fifteen days in public places; and that in pursuance to them a meeting of the voters was held at two o'clock in the afternoon of a certain date thereafter, and the information in no wise challenges the fact of the giving of notices, the presumption obtains that the notices specified the exact time when the meeting was to be held and that the meeting was commenced and held at that time in conformity with the statute. *Ib.*
11. ———: ———: **Called to Order by Superintendent.** All other requisites to the holding of a valid meeting of the voters to determine the question of the formation of a consolidated school district having been complied with, the absence from respondents' answer, in the *quo warranto* proceeding, of an averment that such meeting was called to order by the county superintendent, will not invalidate the district or authorize a demurrer to the answer. That statutory requirement is directory. *Ib.*
12. ———: ———: **Two Hundred Children.** If the answer of respondents contains an averment that the consolidated school district has an area of twelve square miles, it is not defective be-

PLEADING—Continued.

cause it contains no averment that there were two hundred children of school age within its boundaries. The jurisdictional requirement of the statute is in the alternative. *State ex rel. v. Long*, 169.

13. **Amending Petition After Proof: Changing Defense: Permissive Ordinance.** Where the petition charged that a designated ordinance prohibited inequalities in the floor levels of a theater and a violation thereof, and the answer set up another ordinance containing a like prohibition but subject to exception on written permission of named officials and contained an averment of such permission, and defendant's own evidence totally failed to show any such permission, it was not error to permit plaintiff, after the evidence was in, to amend her petition by interlineation to conform to the proof by adding a charge that the ordinance pleaded by defendant had been violated. The amendment to the pleading did not change the defense, and was right. *Oakley v. Richards*, 266.
14. **Quieting Title: Equitable and Legal Title: Relief.** In a suit brought under Sec. 2535, R. S. 1909, the petition may contain two counts, one asking for a determination of the title, and the other sounding in ejectment, and if defendant's title be found vulnerable in equity or void in law, plaintiff may have both possession and the removal of defendant's cloud. *Murphy v. Barron*, 282.
15. ———: **Character of Action.** The character of an action brought under Section 2535, Revised Statutes 1909, is determined by the issues which the pleadings raise. If they present issues of equitable cognizance the action becomes a suit in equity, but a straight action under the statute, in the terms of the statute, is an action at law. *Koehler v. Rowland*, 573.
16. ———: ———: **Converted by Answer: Affirmative Equitable Relief.** Where the petition in a suit brought under Section 2535 states an action at law, an answer which sets up an equitable defense and asks affirmative relief converts the action at once into a suit in equity, so that the rules of equity apply; but the setting up of an equitable defense does not so convert the action unless affirmative equitable relief is prayed. *Ib.*
17. ———: ———: **Forfeiture: No Prayer for Affirmative Relief.** Where the petition follows Section 2535 substantially in the allegations of plaintiff's rights and the defendant's claim, and prays the court to hear and determine all the rights, claims and interests whatsoever of the parties, to adjudge and decree that plaintiffs are the owners and to award them possession, and the answer, after stating reasons why a certain condition named in defendants' deeds should not work a forfeiture of their title, prays the court to adjudge that plaintiffs "have no right, title or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper," it does not contain a prayer for affirmative equitable relief, and the action is not, therefore, converted into a suit in equity, but remains an action at law. *Ib.*
18. ———: **Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him

PLEADING—Continued.

entitled to possession and to award a writ of possession in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession. Ib.

19. ———: ———: **Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to defendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property." Ib.

POLICE OFFICER, ARBITRARY POWERS. See *Cities and Towns*, 16 to 18.

POLICE POWER.

1. **Public Service Commission: Power to Fix Telephone Rates.** The Public Service Commission has power by order to fix telephone charges at rates exceeding maximums prescribed in a franchise granted by a city ordinance to a telephone company prior to the enactment of the Public Service Act of 1913. Such an order does not impair the obligation of contracts evidenced by such ordinance. [Overruling *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, so far as conflictive.] *City of Fulton v. Pub. Serv. Com.*, 67.
2. ———: ———: **Impairment of Individual Contracts.** All contracts made for individual subscribers by the city with a public service telephone company, through the medium of ordinances, are made in contemplation of the State's power to fix rates. Individuals cannot abridge the police power, but all such contracts are made subject to revision by an exercise of that power by the State, and its exercise does not impair the obligations of such individual subscribers. Ib.
3. **Franchise Ordinance: Contract.** The passage of an ordinance by the council of a city of the third class and its acceptance by a water company, by which it is provided that the rent on city hydrants shall be a named sum per year, constitute a contract between the city and company, whether or not the ordinance is submitted to a vote of the people. *State ex rel. v. Pub. Serv. Com.*, 201.
4. **Water Rate: In Excess of Ordinance Rate: Power of Public Service Commission.** The Public Service Commission of Missouri has the lawful right to fix the rate for hydrant water, so far as the city is concerned, in excess of the rate fixed by an existing ordinance. Ib.
5. **Public Service Act: Police Regulation: Legislative Delegation of Power.** The Public Service Act of 1913 and the fixing of reasonable rates to be charged by a public utility company are traceable to the police power of the State, and the Legislature can delegate to the Public Service Commission the power to ascertain and fix reasonable rates for services rendered to the public by divers public service corporations, subject to court review of the question of reasonableness. Ib.

POLICE POWER—Continued.

6. **Abridgment: Nullifying Existing Contracts.** The State of Missouri cannot divest itself of the right to exercise its police power. The Constitution declares that "the exercise of the police power of the State shall never be abridged," and such power cannot be contracted away, nor can the Legislature authorize a municipal corporation to contract it away. A statute which authorizes a city to contract for water service to the city and the general public may be so modified as to delegate to a legislative agent the power to fix rates different from those mentioned in such contract, for the Legislature cannot authorize a municipal corporation and a public service corporation to make a contract which will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract. *City of Fulton v. Pub. Serv. Com.*, 67.
7. **State Regulation: Private Property.** The police power is bottomed and wholly dependent upon the devotion of private property to a public use. The Constitution forbids the regulation of and the exercise of inquisitorial authority over property devoted to private use, and before the State can exercise such regulation the property must be devoted to a public use. *State ex rel. Danciger v. Pub. Serv. Comm.*, 483.
8. **Public Service Utility: Contract Rate: Commission Rate.** Where a public service corporation by written contract agreed to supply electric energy to a private manufacturing company for a designated length of time at designated rates, higher rates subsequently fixed by the State Public Service Commission by the adoption of a schedule of rates applicable for all service of the kind furnished by the public utility, if reasonable, supersede such contract rates, and the manufacturing company is not entitled to an injunction restraining the public service corporation from discontinuing the service upon a refusal to pay such higher rates. *Bolt & Nut Co. v. L. & P. Co.*, 529.
9. —: **Power to Fix Rates.** The power to fix the price at which a public utility corporation is to furnish electricity to the public arises from the police power of the State, which under the Constitution cannot be abridged by contract between the corporation and private citizens; and where the Legislature has by statute designated the Public Service Commission as the instrumentality to exercise such rate-making power, and it in conformity with the statute fixes a schedule of reasonable rates for public service within the bounds of a city, its rates automatically supersede all contract rates coming in conflict with them. *Ib.*

POSSESSION, WRIT OF. See *Quieting Title*, 6 and 7.

PRACTICE.

1. **Recovery of Property: By Person Adjudged Insane Without Notice: Equity.** Since it is necessary for a person who has been adjudged insane without notice to resort to extrinsic facts, in order to show that the appointment of his curator was void and that the sale of his real estate by said curator was void, he is not relegated to an action of ejectment to recover his property, but may resort to equity in the first instance. *Shanklin v. Boyce*, 5.
2. **Life Insurance: Fraudulent Contract.** A policy of life insurance, issued upon an application made by one who personated the applicant, having been conceived in fraud, may, for that reason, in an action on the policy, be shown to be fraudulent and therefore invalid. *Carter v. Ins. Co.*, 84.

PRACTICE—Continued.

3. ———: ———: **Cancellation: Conversion Into Equity.** If the special answer and cross-bill aver with sufficient certainty the invalidity of the contract sued on, and the cross-bill, after stating proper grounds for affirmative relief, contains a prayer for the cancellation of the contract, the action at law is thereby converted into one in equity, and the case is to be heard by the court and not by a jury. *Ib.*
4. **Injury to Passenger: Common Law Right of Action: Demurrer.** Notwithstanding the fact that the statute upon which plaintiff grounds his cause of action for personal injuries is unconstitutional, yet if the petition, independent of that plea, states a good cause of action at common law, a demurrer to the evidence should not be sustained, if it warrants a submission of the case to the jury upon the common-law theory. *Lige v. Railroad*, 249.
5. **Amending Petition After Proof: Changing Defense: Permissive Ordinance.** Where the petition charged that a designated ordinance prohibited inequalities in the floor levels of a theater and a violation thereof, and the answer set up another ordinance containing a like prohibition but subject to exception on written permission of named officials and contained an averment of such permission, and defendant's own evidence totally failed to show any such permission, it was not error to permit plaintiff, after the evidence was in, to amend her petition by interlineation to conform to the proof by adding a charge that the ordinance pleaded by defendant had been violated. The amendment to the pleading did not change the defense, and was right. *Ib.*
6. **Demurrer: Refusal of Leave to File.** It was not error to refuse leave to defendant to file a demurrer to the petition if the filing of it could not have availed him anything. *Ib.*
7. **Motion to Elect.** A refusal to permit defendant leave to file a motion to compel plaintiff to elect between certain causes of action stated in her petition is not error, if she announced that she elected to stand on certain allegations, and the instructions were based on them, and another was given withdrawing all the others from the jury. *Ib.*
8. **Juror: Impartiality.** Where the talesman testified that his business relations with defendants were such that they might affect his verdict, that he preferred not to sit, that he felt embarrassed to sit as a juror against them, but that he would endeavor to do his duty and would exercise his judgment in returning a verdict according to the law and the evidence, the court did not act arbitrarily in rejecting him. *Ib.*
9. **Directed Verdict: Appellate Rule.** The appellate court will not interfere with the action of the trial court in refusing to direct a verdict for defendants where there was substantial evidence to support a verdict for plaintiff. *Laughlin v. Railway*, 459.
10. ———: ———: **All Evidence Considered.** The probative force of the substantial evidence necessary to sustain the verdict rendered for plaintiff is not to be tested by that adduced by him alone, although in passing on a demurrer thereto every reasonable inference deducible therefrom is to be taken as true; but it also may be aided by such of defendant's evidence that helps to make out plaintiff's case. *Ib.*
11. ———: **Proximate Cause: Question for Jury.** The determination of the proximate cause of an injury, whether it be the original

PRACTICE—Continued.

negligence of one party or the intermediate negligence of another, is ordinarily one for the jury. *Laughlin v. Railway*, 459.

12. **Public Road: Damages: Jury Trial: After Appeal.** Upon an appeal from the judgment of the county court "in ordering the establishment of a public road," the appellants are not entitled to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land, or to have the question of damages considered at all. An appeal from the judgment of the county court opening or establishing the road, and from that order alone, does not give the circuit court jurisdiction to try *de novo* the question of damages adjudged by separate judgments in the county court. In *re Matter of Critzer*, 514.
13. ———: ———: **No Request for Jury Trial.** If appellants made no attempt in the circuit court to have a retrial of the question of damages, they cannot be heard to complain in the Supreme Court that they were denied a jury trial on that question. *Ib.*
14. **Quieting Title: Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him entitled to possession and to award a writ of possession in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession. *Koehler v. Rowland*, 573.
15. ———: ———: **Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to defendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property." *Ib.*
16. **Evidence: Same Rules in Law and Equity.** The general rules of evidence in courts of law and in courts of equity are the same, and there seems to be no reason under the code of procedure for applying different rules to the admissibility of testimony. *Savings Bank v. Denker*, 607.

PRINCIPAL AND AGENT.

1. **Deposition: Admission: By Agent of Party.** In order that the declarations of an agent may bind his principal as an admission the declarations must have been made during the continuance of the agency and in regard to the transaction then depending; if they were not contemporaneous with the transaction and illustrative of its character, but merely a subsequent narrative of how it occurred, they are not admissible in evidence against the principal. So that where defendants were sued on a cashier's bond for defalcations occurring prior to his discharge in 1904, statements made by the president of the bank in a deposition taken in 1906 are not admissible as admissions against the bank in its suit on the bond. *Savings Bank v. Denker*, 607.

PRINCIPAL AND AGENT—Continued.

2. ———: **Incomplete: Deprived of Right of Cross-Examination: Death of Deponent.** Where the taking of the deposition by defendants was not completed, but before the witness's examination in chief was concluded an adjournment was had at the request of defendants and with the consent of the parties, and it does not appear that the deposition was not completed on account of deponent's sickness, or that defendants made any effort thereafter to continue the taking of the deposition, or that the illness of deponent was so serious that the deposition could not have been finished at some time during the three months that he continued to live, the deposition cannot as such be admitted over the objection of plaintiff that he was deprived of the right of cross-examination. *Ib.*

PRINCIPAL. See, also, *Cities and Towns*, 19 to 23.

PRINCIPAL AND SURETY.

- 1.^o **Suit on Bond: Admission of Principal: Binding on Sureties: Res Gestae.** An admission of the principal in an employee's bond, with respect to matters pertaining to the performance of his guaranteed duties, made while he is engaged in their discharge, is always competent evidence against the surety in the trial of a suit on the bond. And the words "while engaged in the discharge of his duties" mean that any statement made by the principal during the continuance of the term for which the sureties are bound, concerning any transaction during that term, is admissible against the sureties. So that where an investigation of the cashier's shortage was begun on the fifth of the month and the directors instructed him to make no further entries on the books, and other persons were put in charge of them, although he continued in and around the bank until his discharge on the ninth, a written statement explaining the discrepancies and his false entries made to a director and signed by him on the seventh, was competent evidence against the sureties on a bond which covered the period and made them liable for any loss occasioned by his act. *Savings Bank v. Denker*, 607.
2. **Cashier's Bond: Directors' Knowledge of Dishonesty: Concealment: Neglect: Liability of Sureties.** If the officers and directors of the bank had knowledge of the cashier's dishonesty and accepted the bond with such knowledge, without disclosing to his sureties what they knew of his character, the sureties are not liable. But if they were only careless and negligent in failing to ascertain his character, the sureties are liable. *Ib.*

PROHIBITION.

1. **Jurisdiction: Courts of Appeals: In Original Proceedings.** Where relief is sought other than in the recovery of a monetary judgment, the value of the right involved, estimated in money, constitutes the measure of jurisdiction of the appellate court to hear and determine an original writ. Jurisdiction of a court of appeals in prohibition and other original proceedings should be brought as nearly as possible into harmony with its appellate jurisdiction. A court of appeals is not authorized to issue such writs, or to exercise superintending control over inferior courts, in cases in which the Supreme Court has jurisdiction by appeal or writ of error. *State ex rel. v. Reynolds*, 113.
2. ———: ———: ———: **Suit Against Corporation for Accounting, Etc.** Suit was brought by two stockholders, the par value of whose stock was \$8300, against the directors of a corporation,

PROHIBITION—Continued.

whose tangible property was \$25,000, charging deceit, fraud and waste in its management, and praying for an accounting and the appointment of a receiver. *Held*, that the Court of Appeals had no jurisdiction of a writ of prohibition to prevent the circuit judge from hearing and determining the bill in equity. *State ex rel. v. Reynolds*, 113.

PUBLIC SERVICE COMMISSION.

1. **Grain Scales: Repeal of Prior Statutes.** The Public Service Act, by Section 49, Laws 1913, p. 588, invested the Commission with power to make an order for the erection and maintenance of track scales by a railroad company whenever public necessity therefor exists, and it repealed all prior statutes which interfere with the Commission's discretion to determine, in each individual case, the existence of the public necessity or public convenience. It repealed Section 3157, Revised Statutes 1909, which required a railroad company to erect and keep in good condition, for use in weighing grain shipped over its road, true and correct scales, at all stations from which the shipments for the previous year amounted to fifty thousand bushels or more. And an order of the Commission which requires such scales to be maintained at a certain station, based alone on said Section 3157 and a showing that for the previous year fifty thousand bushels were shipped from said station, without any further showing of public necessity or public convenience is invalid. *State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Comm.*, 60.
2. **Power to Fix Telephone Rates.** The Public Service Commission has power by order to fix telephone charges at rates exceeding maximums prescribed in a franchise granted by a city ordinance to a telephone company prior to the enactment of the Public Service Act of 1913. Such an order does not impair the obligation of contracts evidenced by such ordinance. [Overruling *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 102 Mo. 472, so far as conflictive.] *City of Fulton v. Pub. Serv. Com.*, 67.
3. ———: ———: **Impairment of Individual Contracts: Police Power.** All contracts made for individual subscribers by the city with a public service telephone company, through the medium of ordinances, are made in contemplation of the State's power to fix rates. Individuals cannot abridge the police power, but all such contracts are made subject to revision by an exercise of that power by the State, and its exercise does not impair the obligations of such individual subscribers. *Ib.*
4. **Railroads: Signal Crossings and Gates: Do Not Include Interlocking Plant.** A contract made by a railroad company which was about to construct its tracks across those of an existing railroad belonging to another company, by which the junior company agreed to pay the entire costs of "crossing-signals or gates" thereafter at any time necessary to be erected and maintained, is not an agreement to pay the costs of erecting an "interlocking plant" at the crossing, since the words "crossing signals or gates" do not include an "interlocking plant;" and hence an order of the Public Service Commission, made upon the petition of the junior company, directing the installation of an interlocking plant and requiring the older company to pay a part of the cost, does not impair the obligation of such contract. *State ex rel. C. & A. Ry. Co. v. Pub. Serv. Com.*, 72.
5. ———: **Interlocking Plant: Apportionment of Costs: Train Basis: Unreasonable Order.** Although the portion of the costs of erect-

PUBLIC SERVICE COMMISSION—Continued.

ing and maintaining an interlocking plant apportioned to appellant is somewhat too large if based alone on the average number of trains of each of two railroads daily passing the crossing, yet if the evidence before the Public Service Commission reveals that at least two items were considered in arriving at the apportionment, namely, economy of crossing operation and safety, and the evidence concerning the proper items to be considered in apportioning the costs was not fully developed, and a true solution will of necessity depend upon many items not disclosed, the court will not rule that the apportionment made by the Commission was unreasonable. *Ib.*

6. **Public Utility: Reduction of Rates: Suspension During Appeal: Money Earned Belongs to Company.** Where the Public Service Commission, in order to test the reasonableness of rates charged by a gas company, ordered it to reduce its rates to specified maximums for a period of three years, and retained jurisdiction in order that a proper final order might be made after the test was tried out, and on appeal by the company to the circuit court the order was affirmed, but the court, pending an appeal to the Supreme Court, suspended the order and impounded the excess in rates over those fixed by the Commission, and its judgment was affirmed by the Supreme Court, the gas company is entitled to the excess collected during the time the appeal was pending in the Supreme Court; for, the order having been suspended, the company was lawfully entitled to adhere to its former rates until the judgment of affirmance was rendered. *State ex rel. Watts Eng. Co. v. Pub. Serv. Com.*, 108.
7. **Franchise Ordinance: Contract.** The passage of an ordinance by the council of a city of the third class and its acceptance by a water company, by which it is provided that the rent on city hydrants shall be a named sum per year, constitute a contract between the city and company, whether or not the ordinance is submitted to a vote of the people. *State ex rel. v. Pub. Serv. Com.*, 201.
8. **Water Rate: In Excess of Ordinance Rate: Power.** The Public Service Commission of Missouri has the lawful right to fix the rate for hydrant water, so far as the city is concerned, in excess of the rate fixed by an existing ordinance. *Ib.*
9. **Public Service Act: Police Regulation: Legislative Delegation of Power.** The Public Service Act of 1913 and the fixing of reasonable rates to be charged by a public utility company are traceable to the police power of the State, and the Legislature can delegate to the Public Service Commission the power to ascertain and fix reasonable rates for services rendered to the public by diverse public service corporations, subject to court review of the question of reasonableness. *Ib.*
10. **Police Power: Abridgment: Nullifying Existing Contracts.** The State of Missouri cannot divest itself of the right to exercise its police power. The Constitution declares that "the exercise of the police power of the State shall never be abridged," and such power cannot be contracted away, nor can the Legislature authorize a municipal corporation to contract it away. A statute which authorizes a city to contract for water service to the city and the general public may be so modified as to delegate to a legislative agent the power to fix rates different from those mentioned in such contract, for the Legislature cannot authorize a municipal corporation and a public service corporation to make a contract

PUBLIC SERVICE COMMISSION—Continued.

which will preclude the sovereign power of the State from fixing reasonable rates irrespective of the contract. State ex rel. v. Pub. Serv. Com., 201.

11. **Judicial Powers: Validity of Franchise.** The Public Service Commission is not a court. It is not invested with judicial powers. It has no power to adjudge a franchise granted by a county court to a company to do lighting throughout the county, to be invalid as to a city incorporated after the franchise was granted. State ex rel. v. Atkinson, 325.
12. **Franchise: Certificate of Convenience and Necessity: Right to Intervene.** A company which has been furnishing electricity to a city and its inhabitants, under a county franchise, granted prior to the incorporation of the city, is, upon the granting of a franchise by the city to another company and the application by that company to the Public Service Commission for a certificate of public convenience and necessity, entitled to be heard in the determination of the question as to whether the certificate shall be issued to applicant. Ib.
13. **Competing Plants.** The policy of the Public Service Act is to substitute regulated monopoly for destructive competition. But the spirit of this policy is the protection of the public; the protection given to the utility is incidental. The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public. Ib.
14. ———: **High Rates.** Ordinarily high rates for electric light, being correctible through appropriate regulation by the Public Service Commission, do not call for the introduction of competitive conditions. Ib.
15. ———: **Dependent on Circumstances.** The rule of regulated monopoly as to public utilities is not applicable without discrimination in every case where competition seeks to enter. It is a rule designed, as a practical system, to promote the public good, and whether its application will accomplish that purpose depends upon the particular facts in each case. And in this case the facts are reviewed, and it is *held* that the Public Service Commission did not transgress the meaning of the Public Service Act, in granting, to an electric light company, which had obtained a franchise from a city of 6500 inhabitants, a certificate of convenience and necessity to use said franchise, notwithstanding the objections of another company, which had been for some years supplying the city with light, but made no showing of its ability to continue to profitably do so at rates which are shown to be profitable to applicant. Ib.
16. **Public Utility: Private Person: Subject to Full Regulation.** If a private person is a public utility, he is such within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act. State ex rel. Danciger v. Pub. Serv. Comm., 483.
17. ———: ———: ———: **This Case.** A brewery corporation, whose stock was owned by M. O. Danciger and his brothers, was engaged in the brewing of beer, in a town of 1000 or 1500 inhabitants. It installed a plant for producing electric light and operating by electricity the machinery used in the brewery. Discovering that it was able to produce more electricity than it needed for those purposes, it began to make special private contracts to furnish current for light and power to certain private persons within

PUBLIC SERVICE COMMISSION—Continued.

three blocks of its plant, about thirty in all, and also furnished thirty street lights, for five or six of which it received \$19.50 per month, the others being furnished gratuitously. It was not incorporated for this purpose, and the contracts were made with M. O. Danciger & Company, which was simply a trade name of M. O. Danciger. He had no distributing system, and the persons who bought electricity from him constructed their own wires to the electric plant and installed their own meters. He had no franchise or license from the town, neither in his own name or his trade name or any other, nor did he have any permission to erect poles or wires upon the streets or alleys, nor did he have or assert the power of eminent domain, nor did he at any time expressly profess a readiness or willingness to furnish electricity to all persons within the town, or to all those within the restricted three-block area. *Held*, that he was not a public utility, and the Public Service Commission has no power to compel him to continue the service or to regulate it. It cannot be said that a private company which undertakes to sell no more than it surplus electricity to a few near-by citizens, and not to the public generally, is engaged in a public business. *Ib*.

18. ———: **Contract Rate: Commission Rate.** Where a public service corporation by written contract agreed to supply electric energy to a private manufacturing company for a designated length of time at designated rates, higher rates subsequently fixed by the State Public Service Commission by the adoption of a schedule of rates applicable for all service of the kind furnished by the public utility, if reasonable, supersede such contract rates, and the manufacturing company is not entitled to an injunction restraining the public service corporation from discontinuing the service upon a refusal to pay such higher rates. *Bolt & Nut Co. v. L. & P. Co.*, 529.
19. ———: ———: **Police Power.** The power to fix the price at which a public utility corporation is to furnish electricity to the public arises from the police power of the State, which under the Constitution cannot be abridged by contract between the corporation and private citizens; and where the Legislature has by statute designated the Public Service Commission as the instrumentality to exercise such rate-making power, and it in conformity with the statute fixes a schedule of reasonable rates for public service within the bounds of a city, its rates automatically supersede all contract rates coming in conflict with them. *Ib*.

PUBLIC MONEYS. See Appropriations, and Schools, 1.

PUBLIC UTILITIES.

1. **Discrimination in Rates: Free Light to City.** A provision in the franchise granted by a city to an electric light company whereby the company is required to furnish the city "without charge, lights for its offices and fire house, to the extent of one hundred kilowatt hours per month," worth \$40 per year, is not an unreasonable discrimination in favor of the city, in view of the fact that the city's annual account for street lights exceeds \$2,000. *State ex rel. v. Atkinson*, 325.
2. ———: ———: **Rest of Franchise Valid: Collateral Proceeding.** Even though the clause in a franchise whereby the company agrees to furnish electricity to the city for its offices and fire house is unlawful discrimination, it does not follow that the remaining portions of the franchise are void. If the city and company are

PUBLIC UTILITIES—Continued.

- willing to strike it out, another company, which failed to secure a franchise, should not be heard to complain. Nor could its invalidity be adjudged in a collateral proceeding. *State ex rel. v. Atkinson*, 325.
3. **Public Service Commission: Judicial Powers.** The Public Service Commission is not a court. It is not invested with judicial powers. It has no power to adjudge a franchise granted by a county court to a company to do lighting throughout the county, to be invalid as to a city incorporated after the franchise was granted. *Ib.*
 4. **Franchise: Certificate of Convenience and Necessity: Right to Intervene.** A company which has been furnishing electricity to a city and its inhabitants, under a county franchise, granted prior to the incorporation of the city, is, upon the granting of a franchise by the city to another company and the application by that company to the Public Service Commission for a certificate of public convenience and necessity, entitled to be heard in the determination of the question as to whether the certificate shall be issued to applicant. *Ib.*
 5. **Competing Plants.** The policy of the Public Service Act is to substitute regulated monopoly for destructive competition. But the spirit of this policy is the protection of the public; the protection given to the utility is incidental. The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged the public. *Ib.*
 6. ———: **High Rates.** Ordinarily high rates for electric light, being correctible through appropriate regulation by the Public Service Commission, do not call for the introduction of competitive conditions. *Ib.*
 7. ———: **Dependent on Circumstances.** The rule of regulated monopoly as to public utilities is not applicable without discrimination in every case where competition seeks to enter. It is a rule designed, as a practical system, to promote the public good, and whether its application will accomplish that purpose depends upon the particular facts in each case. And in this case the facts are reviewed, and it is held that the Public Service Commission did not transgress the meaning of the Public Service Act, in granting, to an electric light company, which had obtained a franchise from a city of 6500 inhabitants, a certificate of convenience and necessity to use said franchise, notwithstanding the objections of another company, which had been for some years supplying the city with light, but made no showing of its ability to continue to profitably do so at rates which are shown to be profitable to applicant. *Ib.*
 8. **Public Service: Motive for Discontinuance: Law of Case.** The motive for discontinuing the supply to electricity to citizens of a town by a firm which for some time had essayed to furnish it to some of them, is of no concern to the courts in determining whether said firm had a legal right to discontinue the service. If the citizens are not under the law entitled to the service, no motive, however reprehensible, for discontinuing it, can serve as a sufficient reason to any court to compel a restoration of it. *State ex rel. Danciger v. Pub. Serv. Com.*, 483.
 9. ———: ———: **Power to Compel Public Service.** If the firm which had essayed to sell electricity to a limited portion of the citizens

PUBLIC UTILITIES—Continued.

- of a town is a public utility, no ill-feeling growing out of a Local Option election and no lack of facilities to furnish the service, will serve as an excuse for discontinuing it, because the Public Service Commission has power to compel the firm to provide reasonable and ample facilities; but if it is not a public utility, no excuse is necessary. *Ib.*
10. ———: **Corporate Powers: Ultra Vires.** In determining whether or not a corporation is a public utility, the important thing is not what its charter says it may do, but what it actually does. If the things it does constitute it a public utility, it will not be heard to say that those things are *ultra vires* of its charter powers, or to urge its own wrongful aggressions to escape its obligations to render the public service. *Ib.*
 11. **Definition: For Public Use Understood.** While the statute defining an "electrical corporation" and an "electric plant" does not contain the words "for a public use," they are to be understood and to be read into it. An electric plant must of necessity be devoted to a public use before it is subject to public regulation. *Ib.*
 12. **Private Person.** A single person, having constructed an electric plant solely for private use, may, by holding himself out as willing and ready to serve the public, by such profession and by the furnishing of a general public service, become a public utility. *Ib.*
 13. ———: **Subject to Full Regulation.** If a private person is a public utility, he is such within the whole purview and for all inquisitorial and regulatory purposes of the Public Service Commission Act. *Ib.*
 14. ———; ———: **This Case.** A brewery corporation, whose stock was owned by M. O. Danciger and his brothers, was engaged in the brewing of beer, in a town of 1000 or 1500 inhabitants. It installed a plant for producing electric light and operating by electricity the machinery used in the brewery. Discovering that it was able to produce more electricity than it needed for those purposes, it began to make special private contracts to furnish current for light and power to certain private persons within three blocks of its plant, about thirty in all, and also furnished thirty street lights, for five or six of which it received \$19.50 per month, the others being furnished gratuitously. It was not incorporated for this purpose, and the contracts were made with M. O. Danciger & Company, which was simply a trade name of M. O. Danciger. He had no distributing system, and the persons who bought electricity from him constructed their own wires to the electric plant and installed their own meters. He had no franchise or license from the town, neither in his own name or his trade name or any other, nor did he have any permission to erect poles or wires upon the streets or alleys, nor did he have or assert the power of eminent domain, nor did he at any time expressly profess a readiness or willingness to furnish electricity to all persons within the town, or to all those within the restricted three-block area. *Held*, that he was not a public utility, and the Public Service Commission has no power to compel him to continue the service or to regulate it. It cannot be said that a private company which undertakes to sell no more than its surplus electricity to a few near-by citizens, and not to the public generally, is engaged in a public business. *Ib.*
 15. **Police Power: State Regulation: Private Property.** The police power is bottomed and wholly dependent upon the devotion

PUBLIC UTILITIES—Continued.

of private property to a public use. The Constitution forbids the regulation of and the exercise of inquisitorial authority over property devoted to private use, and before the State can exercise such regulation the property must be devoted to a public use. *State ex rel. Danciger v. Pub. Serv. Com.*, 483.

QUIETING TITLE.

1. **Pleading: Equitable and Legal Title: Relief.** In a suit brought under Sec. 2535, R. S. 1909, the petition may contain two counts, one asking for a determination of the title, and the other sounding in ejectment, and if defendant's title be found vulnerable in equity or void in law, plaintiff may have both possession and the removal of defendant's cloud. *Murphy v. Barron*, 282.
2. **Character of Action: Pleading.** The character of an action brought under Section 2535, Revised Statutes 1909, is determined by the issues which the pleadings raise. If they present issues of equitable cognizance the action becomes a suit in equity, but a straight action under the statute, in the terms of the statute, is an action at law. *Koehler v. Rowland*, 573.
3. ———: ———: **Converted by Answer: Affirmative Equitable Relief.** Where the petition in a suit brought under Section 2535 states an action at law, an answer which sets up an equitable defense and asks affirmative relief converts the action at once into a suit in equity, so that the rules of equity apply; but the setting up of an equitable defense does not so convert the action unless affirmative equitable relief is prayed. *Ib.*
4. ———: ———: **Forfeiture: No Prayer for Affirmative Relief.** Where the petition follows Section 2535 substantially in the allegations of plaintiffs' rights and the defendants' claim, and prays the court to hear and determine all the rights, claims and interests whatsoever of the parties, to adjudge and decree that plaintiffs are the owners and to award them possession, and the answer, after stating reasons why a certain condition named in defendants' deeds should not work a forfeiture of their title, prays the court to adjudge that plaintiffs "have no right, title or interest in or to said property, and that the title to said property be quieted and confirmed in these defendants free from any claim of the plaintiffs, and for such other and further relief as to the court in equity and good conscience may seem meet and proper," it does not contain a prayer for affirmative equitable relief, and the action is not, therefore, converted into a suit in equity, but remains an action at law. *Ib.*
5. **Findings of Trial Court: Binding On Appeal.** If the suit brought under Section 2535 is an action at law, the findings of the trial court, if supported by substantial evidence, are binding on the appellate court. *Ib.*
6. **Possession.** The amendment of 1909 to Section 2535 did not enlarge the scope of the statute so as to either repeal the statutes relating to ejectment or to provide for giving possession in an action brought under it; but plaintiff can add a count in ejectment to his petition to ascertain and determine the title, and if instead of adding such count he prays the court to adjudge him entitled to possession and to award a writ of possession in his favor, and no objection is made to his pleading, by motion to elect or otherwise, the court can award him possession. *Ib.*
7. ———: **Improvements: Compensation.** The amendment of 1909 to Section 2535 does not permit compensation to be allowed to de-

QUIETING TITLE—Continued.

fendant for improvements put upon the property unless compensation is "asked for in the pleadings." And under Section 2401 and other sections of the Ejectment Act compensation for improvements cannot be assessed in favor of an unsuccessful defendant "in the same case." Consequently the court, having found all the facts necessary to entitle plaintiff to possession and rendered judgment accordingly, cannot award a new trial on the ground that "defendants are entitled to compensation for improvements on the property." *Ib.*

QUO WARRANTO.

1. **Appeal: By Relators.** The individuals at whose request a proceeding in the nature of *quo warranto* has been instituted by the prosecuting attorney to determine the right of respondents to exercise the powers of school directors have the right to prosecute an appeal after said proceeding has been dismissed. *State ex rel. v. Long, 169.*
2. ———: **Affidavit: Made By Agent.** An affidavit for an appeal, made by appellants' attorney as their agent and containing the required statutory allegations, is sufficient. *Ib.*
3. **Pleading: Liberally Construed.** The common-law rule that pleadings must be strictly construed against the pleader has, by statute, been either modified or abrogated in favor of liberal construction. Even upon demurrer it is permissible to infer all facts from those expressly stated that may be implied by fair and reasonable indendment. *Ib.*
4. ———: **Consolidated School District: Answer: Exact Date of Filing of Petition.** Where the information in a *quo warranto* contains only the general charge that the proceedings "were irregular, contrary to the requirements of the law and void," an averment in the answer that a petition for the establishment of the consolidated school district was filed with the county superintendent in January, 1916, is sufficiently exact upon demurrer, even in view of the rule that the answer of respondents must contain definite denials of the allegations of the information and affirmative declarations of their rights. The material averment of the filing have been made, objection to the failure to allege the exact date should be made by a motion to make more definite and certain. *Ib.*
5. ———: ———: ———: **Meeting of Voters.** Where the answer avers that ten notices of the time, place and purpose of a meeting of the voters of the proposed consolidated school district and five plats of its boundaries were posted for fifteen days in public places, and that in pursuance to them a meeting of the voters was held at two o'clock in the afternoon of a certain date thereafter, and the information in no wise challenges the fact of the giving of notices, the presumption obtains that the notices specified the exact time when the meeting was to be held and that the meeting was commenced and held at that time in conformity with the statute. *Ib.*
6. ———: ———: ———: ———: **Called to Order By Superintendent.** All others requisites to the holding of a valid meeting of the voters to determine the question of the formation of a consolidated school district having been complied with, the absence from respondents' answer, in the *quo warranto* proceeding, of an averment that such meeting was called to order by the county superintendent, will not invalidate the district or authorize a demurrer to the answer. That statutory requirement is directory. *Ib.*

QUO WARRANTO—Continued.

7. ———: ———: ———: **Two Hundred Children.** If the answer of respondents contains an averment that the consolidated school district has an area of twelve square miles, it is not defective because it contains no averment that there were two hundred children of school age within its boundaries. The jurisdictional requirement of the statute is in the alternative. *State ex rel. v. Long*, 169.
8. **Consolidated School District: Valid Statute.** Section 10776, Revised Statutes 1909, is a valid enactment and applicable to "school districts that may be hereafter organized under the laws of this State," and is therefore applicable to a consolidated school district organized in pursuance to a subsequent statute. *State ex inf. v. School District*, 522.
9. ———: **Forfeiture of Franchise: Failure to Maintain Eight Months' School.** Section 10776, Revised Statutes 1909, declaring that "whenever any school district . . . shall fail or refuse, for a period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body," was only intended to affix a forfeiture for failure to provide an eight months' school when such omission did not result from inability to have so long a term, or where the failure was purposeful or intentional on the part of the school district. It has no application to a consolidated school district to which, during the pendency of litigation in which the validity of its organization is drawn in question, the county officers refuse to credit or pay the school taxes, and which because of those facts is unable to conduct a school, but nevertheless in entire good faith endeavors, as far as possible, to exercise its corporate franchise. *Ib.*
10. ———: ———: **Failure to Maintain Elementary Schools.** The terms of Section 4 of the Act of 1913 (Laws 1913, p. 723) making it the duty of a consolidated school district to maintain an elementary school within a named distance of pupils, in case no transportation is provided for, do not condition an automatic forfeiture of the district's corporate franchise upon its non-observance, and the courts will not make a failure to observe its requirements a ground of forfeiture. [*Criticizing State ex rel. v. School District*, 195 Mo. App. 507.] *Ib.*

RAILROADS.

1. **Signal Crossings and Gates: Do Not Include Interlocking Plant.** A contract made by a railroad company which was about to construct its tracks across those of an existing railroad belonging to another company, by which the junior company agreed to pay the entire costs of "crossing-signals or gates" thereafter at any time necessary to be erected and maintained, is not an agreement to pay the costs of erecting an "interlocking plant" at the crossing, since the words "crossing signals or gates" do not include an "interlocking plant;" and hence an order of the Public Service Commission, made upon the petition of the junior company, directing the installation of an interlocking plant and requiring the older company to pay a part of the cost, does not impair the obligation of such contract. *State ex rel. C. & A. Ry. Co. v. Pub. Serv. Comm.*, 72.
2. **Interlocking Plant: Apportionment of Costs: Train Basis: Unreasonable Order.** Although the portion of the costs of erect-

RAILROADS—Continued.

ing and maintaining an interlocking plant apportioned to appellant is somewhat too large if based alone on the average number of trains of each of two railroads daily passing the crossing, yet if the evidence before the Public Service Commission reveals that at least two items were considered in arriving at the apportionment, namely, economy of crossing operation and safety, and the evidence concerning the proper items to be considered in apportioning the costs was not fully developed, and a true solution will of necessity depend upon many items not disclosed, the court will not rule that the apportionment made by the Commission was unreasonable. *Ib.*

3. **Intoxicated Passenger: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 438 (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicating liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the names of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitutions. *Lige v. Railroad*, 249.
4. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The Act of 1909, page 438 (Secs. 4710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United States which prohibit the enforcement of any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States. *Ib.*
5. ———: ———: **Common Law Right of Action Nevertheless.** Notwithstanding the fact that the statute upon which plaintiff grounds his cause of action for personal injuries is unconstitutional, yet if the petition, independent of that plea, states a good cause of action at common law, a demurrer to the evidence should not be sustained, if it warrants a submission of the case to the jury upon the common-law theory. *Ib.*
6. ———: **Injury to Fellow Passenger: Liability of Carrier.** A common carrier is bound to exercise the utmost practicable care for the safety of its passengers, to safely transport them, and to protect them while in transit from violence and insults from all persons on the train, including fellow-passengers, and any violation of this duty which results injuriously to a passenger renders

RAILROADS—Continued.

the carrier liable in damages therefor; but the duty does not amount to an absolute guaranty that a passenger will be transported with absolute safety or that he will not be insulted or injured by an intoxicated fellow-passenger. The rule means that the conductor and other trainmen must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries, but the carrier is not liable for injuries inflicted by one passenger upon another, if in the exercise of that degree of care the assault or injury is not to be foreseen. *Lige v. Railroad*, 249.

7. ———: ———: ———: **Sudden and Unexpected Assault.** A common carrier is not liable in damages to a passenger for injuries resulting from a sudden assault by another intoxicated passenger, who, without any previous threat or verbal altercation, who was not previously boisterous or insulting in his talk or conduct and who gave no evidence that he was intoxicated except that he was talking generally and having a jolly good-time, suddenly seized an iron wrench and struck on the head the other passenger, who was a total stranger to him. *Ib.*
8. **Negligence: Unforeseen Accident.** A party charged with negligence may be held liable for anything which, after the injury is complete, appears to be a natural or probable consequence of his negligent act. The fact that the trainmen, who backed the freight car off the end of a switch track and on to a tank ten feet beyond the end, did not know that it contained an explosive, does not protect the railroad company from damages caused by the explosion. *Kupferle Co. v. Term. Ry. Co.*, 451.
9. ———: **Obstacle Beside Track.** Where it is necessary for a brakeman of a freight train, in order to mount a moving car, to grasp an iron stirrup or hand-hold while running along-side the car, he is authorized in assuming that the right-of-way is clear of obstructions, such, for instance, as a keg of railway spikes. *Laughlin v. Railway*, 459.
10. ———: **Inferences from Proven Facts: Proximate Cause.** The testimony of plaintiff, a brakeman of a freight train which had stopped to take water, was that after it had started and was running at a rate of five to seven miles per hour he attempted to swing himself upon a car by grasping an iron stirrup and was thereby lifted off the ground and while his feet were in mid-air they struck an obstacle, making a sound as of pieces of iron striking together; that the impact broke his hold on the stirrup, causing him to fall; and that when he recovered from a condition of unconsciousness he saw a keg of spikes near his feet. On the day of the accident the track at the point had been repaired, by taking out old and putting in new ties, and spikes had been pulled from the old ties, and inferably placed in the keg. *Held*, that the jury were authorized in making the inference that the railroad trackmen had left the keg at the place where it was found after the accident, and that under the facts proved and circumstances shown the plaintiff's fall was caused by his legs striking the keg. *Ib.*

RATES FOR PUBLIC SERVICE. See **Public Utilities.**

RECEIPT. See **Accord and Satisfaction.**

RECOGNIZANCE. See **Bond, Bail.**

ROAD DISTRICT.

1. **Motion For New Trial: Reasons for Ruling: Facts Established.** Where the motion for a new trial does not allege that the court improperly found any fact, and designates as the only error that the judgment for defendant was for the wrong party, it will be assumed on appeal from an order granting a new trial that the disputed facts were found in appellant's favor, and the question for determination is one of law, that is, whether on the facts found the judgment was against the law. *Rose v. Road District*, 590.
2. **Bonds: Validity: Power to Issue: Collateral Details.** The purchaser of road district bonds, for value before maturity, in the usual course of business, is not required to ascertain if all matters of detail in their issuance were regular. If the commissioners were empowered to issue them and they appear upon their face to have been issued in conformity with the statute, he is not chargeable with notice of collateral facts as to whether the contract for the public improvement was properly entered into or faithfully performed. *Ib.*
3. ———: **Collateral Matters: Plans of Construction, Etc.** Those parts of the statute (Sec. 10618, R. S. 1909) requiring the commissioners of a road district to employ an engineer to draw plans, advertise for bids and enter into a contract for the construction of the roads, relate to matters preliminary and collateral in their nature, over which a bona-fide purchaser of the district's bonds has no control, and hence they do not affect their validity. *Ib.*
4. ———: **Derelictions of Contractor.** The bona-fide purchaser of road district bonds cannot be held responsible for the failure of the contractor, over whom he had no control, with whom he had no contract and was not in privity, to complete the work within the time required by his contract, or to surface the road the agreed depth with crushed stone, or because he abandoned the contract before the work was completed. *Ib.*
5. ———: **Certification of Amount.** The proviso of Section 10620, Revised Statutes 1909, as amended in 1911, requiring the commissioners of a road district, after its bonds have been issued and attested, to "make out and certify to the county clerk a statement of the amount of the bond issue, and a description of each tract of land within a certain distance of the proposed road, and acknowledge and file the same with the county clerk," can only be complied with after the bonds have been issued, and a failure to comply with it does not affect the validity of the bonds. *Ib.*

ROADS AND HIGHWAYS.

1. **Evidence: Transcript of County Court Record.** In the trial in the circuit court of a proceeding to establish a public road, where the issue as to damages is not being tried, but the only issue is the one of the public necessity of the proposed road, certified copies of the roll and record of the proceedings in the county court are proper evidence. In *matter of Critzer*, 514.
2. **Necessity: Established Cross Road.** The existence or nonexistence of a parallel road one-half mile distant from the proposed road, and whether it has been established by dedication or general use, or has a definite location, is not conclusive of the public necessity of the proposed road. Under the statute (Sec. 10437, R. S. 1909) the public necessity of a proposed road does not de-

ROADS AND HIGHWAYS—Continued.

- pend upon a showing that no other possible egress or ingress for the public use exists. In matter of Critzer, 514.
3. ———: **Conflicting Evidence.** A proceeding to establish a public road is an action at law, and if the evidence on the question of its public necessity is conflicting and there is ample evidence to justify the court's finding that there is a public necessity for the road, the Supreme Court will not interfere with the finding. *Ib.*
 4. **Notices: Certified Copy of Affidavit.** An objection that a certified copy of the affidavit filed in the county court showing proper posting of notices of the intended application for the establishment of a proposed public road is not the best evidence and should not have been admitted in evidence in the trial on appeal in the circuit court until the loss of the original was accounted for, made for the first time in the Supreme Court, will not be ruled. *Ib.*
 5. **Damages: Jury Trial: After Appeal.** Upon an appeal from the judgment of the county court "in ordering the establishment of a public road," the appellants are not entitled to a jury trial to determine the amount of damages sustained by them by reason of the appropriation of their land, or to have the question of damages considered at all. An appeal from the judgment of the county court opening or establishing the road, and from that order alone, does not give the circuit court jurisdiction to try *de novo* the question of damages adjudged by separate judgments in the county court. *Ib.*
 6. ———: **No Request for Jury Trial.** If appellants made no attempt in the circuit court to have a retrial of the question of damages, they cannot be heard to complain in the Supreme Court that they were denied a jury trial on that question. *Ib.*
 7. **Bonds: Validity: Power to Issue: Collateral Details.** The purchaser of road district bonds, for value before maturity, in the usual course of business, is not required to ascertain if all matters of detail in their issuance were regular. If the commissioners were empowered to issue them and they appear upon their face to have been issued in conformity with the statute, he is not chargeable with notice of collateral facts as to whether the contract for the public improvement was properly entered into or faithfully performed. *Rose v. Road District*, 590.

SCHOOLS.

1. **Superintendent of Schools: Traveling Expenses: Outside of State.** Since the Legislature appropriated money to pay the traveling expenses of the office of State Superintendent of Public Schools, and the statute prescribing his duties says he shall have power "to in every way elevate the standard and efficiency of the instruction given in the public schools of the State" and further says that "all moneys reasonably expended in the execution of these duties shall, upon due proof," be allowed and paid by the State, the question of the necessity and expediency of incurring expense for this purpose, in the absence of statutory restriction, is to be determined by the Superintendent, and not by the State Auditor; and in consequence a reasonable expense account incurred by the Superintendent in railroad fares and hotel accommodations in attending an annual meeting, at Portland, Oregon, of the National Education Association, composed of superintendents of public

SCHOOLS—Continued.

schools in all the States and of leading teachers and educators throughout the country and organized to promote, foster and encourage the cause of public education generally, should, upon the Superintendent's approval, be audited by the State Auditor for payment out of the moneys so appropriated, as an expense useful and properly to be incurred in the performance of the Superintendent's statutory duty "to elevate the standard and efficiency of the instruction given in the public schools of the State."

Held, by WALKER, J., dissenting, that the statutes contain no intimation of a requirement that the State Superintendent shall attend educational associations, and without a statute declaring, either in express terms or by reasonable implication, it to be his duty to attend national educational associations, the Legislature itself could not appropriate money to pay his traveling expenses in attending them. State ex rel. Lamkin v. Hackmann, 47.

2. **Pleading: Consolidated School District: Answer: Exact Date of Filing of Petition.** Where the information in a *quo warranto* contains only the general charge that the proceedings "were irregular, contrary to the requirements of law and void," an averment in the answer that a petition for the establishment of the consolidated school district was filed with the county superintendent in January, 1916, is sufficiently exact upon demurrer, even in view of the rule that the answer of respondents must contain definite denials of the allegations of the information and affirmative declarations of their rights. The material averment of the filing having been made, objection to the failure to allege the exact date should be made by a motion to make more definite and certain. State ex rel. v. Long, 169.
3. ———: ———: ———: **Meeting of Voters.** Where the answer avers that ten notices of the time, place and purpose of a meeting of the voters of the proposed consolidated school district and five plats of its boundaries were posted for fifteen days in public places, and that in pursuance to them a meeting of the voters was held at two o'clock in the afternoon of a certain date thereafter, and the information in no wise challenges the fact of the giving of notices, the presumption obtains that the notices specified the exact time when the meeting was to be held and that the meeting was commenced and held at that time in conformity with the statute. Ib.
4. ———: ———: ———: ———: **Called to Order By Superintendent.** All other requisites to the holding of a valid meeting of the voters to determine the question of the formation of a consolidated school district having been complied with, the absence from respondents' answer, in the *quo warranto* proceedings, of an averment that such meeting was called to order by the county superintendent, will not invalidate the district or authorize a demurrer to the answer. That statutory requirement is directory. Ib.
5. ———: ———: ———: **Two Hundred Children.** If the answer of respondents contains an averment that the consolidated school district has an area of twelve square miles, it is not defective because it contains no averment that there were two hundred children of school age within its boundaries. The jurisdictional requirement of the statute is in the alternative. Ib.
6. **School Property: Special Tax Bills: Moral Obligation.** Plaintiff brought suit to enjoin a school board from ordering the payment,

SCHOOLS—Continued.

out of school funds, of special tax bills, issued against school property, in payment for a sewer. The trial court held school property was exempt, but refused to grant an injunction "on the ground that the board were acting in good faith and had the power to assume a moral obligation, notwithstanding the absence of legal liability." Plaintiff on appeal confines his assignment of error to the question whether special tax bills can be legally enforced against school property, and fails to assail the ruling on which the court rested its judgment. *Held*, that all that appellant urges may be conceded and yet the judgment rests upon the independent and only ground on which the court placed it, and there being no assignment that the court erred in resting it upon that ground, the judgment must be affirmed. *Hiemenz v. Harper*, 380.

7. **Consolidated School District: Valid Statute.** Section 10776, Revised Statutes 1909, is a valid enactment and applicable to "school districts that may be hereafter organized under the laws of this State," and is therefore applicable to a consolidated school district organized in pursuance to a subsequent statute. *State ex inf. v. School District*, 522.
8. ———: **Forfeiture of Franchise: Failure to Maintain Eight Months' School.** Section 10776, Revised Statutes 1909, declaring that "whenever any school district . . . shall fail or refuse, for a period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body," was only intended to affix a forfeiture for failure to provide an eight months' school when such omission did not result from inability to have so long a term, or where the failure was purposeful or intentional on the part of the school district. It has no application to a consolidated school district to which, during the pendency of litigation in which the validity of its organization is drawn in question, the county officers refuse to credit or pay the school taxes, and which because of those facts is unable to conduct a school, but nevertheless in entire good faith endeavors, as far as possible, to exercise its corporate franchise. *Ib.*
9. ———: ———: **Failure to Maintain Elementary Schools.** The terms of Section 4 of the Act of 1913 (Laws 1913, p. 723) making it the duty of a consolidated school district to maintain an elementary school within a named distance of pupils, in case no transportation is provided for, do not condition an automatic forfeiture of the district's corporate franchise upon its non-observance, and the courts will not make a failure to observe its requirements a ground of forfeiture. [Criticizing *State ex rel. v. School District*, 195 Mo. App. 507.] *Ib.*

SCIRE FACIAS. See *Bond, Bail*.

SEDUCTION.

1. **Corroboration.** While it is not necessary, in a prosecution for seduction, that there shall be two witnesses to sustain the charge, nor need the corroborative evidence be tantamount to another witness, it must be sufficient to counterbalance the testimony of the accused and thus remove the legal presumption of his innocence. *State v. Stemmons*, 544.

SEDUCTION—Continued.

2. ———: **Promise of Marriage.** In a prosecution for seduction corroborative testimony is required only as to the promise of marriage, and may consist of circumstances, but must come from others than the prosecutrix. It may consist of evidence of such conduct on the part of the parties as usually accompanies a promise of marriage, or admissions of the defendant, or continued attentions by him to prosecutrix, covering a long time, including frequent visits, during which she kept no other company, and proof of preparations for marriage made by prosecutrix following a continuous courtship is competent. *Ib.*
3. **Promise of Marriage: When Made.** In a prosecution for seduction it is not necessary that the promise of marriage be made immediately preceding the intercourse; all that is necessary to show is that if made then or previously defendant thereby accomplished prosecutrix's seduction. *Ib.*
4. **Proof That Prosecutrix Was Unmarried.** It is essential in a seduction case that it be made to appear by evidence that prosecutrix was unmarried; but such status may be shown by facts and circumstances. So where prosecutrix testified that she had never had sexual intercourse with any one except defendant, that he told her that if she got into trouble on account of her relations with him he would marry her at once, she bore her parent's name, was questioned throughout the trial as "Miss," was referred to as "this girl," and the details of her manner and place of living and of her associations with defendant indicated an unmarried status, the evidence was sufficient to support a finding that she was unmarried, although there was no affirmative statement by any witness that she was unmarried. *Ib.*
5. **Barter for Promise.** The forceful facts of this case, showing the bringing into play by defendant of the arts and blandishments of the seducer, leave nothing on which to base a contention that, instead of being seduced within the meaning of the statute, prosecutrix bartered away her virtue in exchange for a promise of marriage. *Ib.*
6. **Instruction: Argumentative: Comment on Evidence: Attributing Pregnancy to Betrayal.** An instruction which is argumentative in form, and an improper comment on the testimony of prosecutrix should be refused; and an instruction in a seduction case, which tells the jury that they should "scrutinize the testimony of the prosecutrix very closely, for the law assumes that a woman, finding herself pregnant, has the most potent motives to assert her condition was brought about by a promise of marriage, for very obvious reasons: she must excuse the act to her family, to her friends and to society, and every consideration would impel her to attribute it to deception and betrayal," is such an instruction. *Ib.*
7. ———: **Corroboration of Promise: Preparations for Marriage.** There being positive testimony by others than prosecutrix that after the promise she had made preparations for marriage, and defendant having made no effort to show that they were not made nor to question their good faith, the trial court did not err in giving an instruction authorizing the jury to consider the preparations she had made for housekeeping as one of the corroborating circumstances of the promise of marriage, "although it has not been shown that defendant had knowledge of such preparations." *Ib.*

SETTLEMENT. See **Accord and Satisfaction.**

STATUTES CITED AND CONSTRUED.

Revised Statutes 1909

- Section 476, see pages 14, 15
 1807, see page 94.
 1831, see page 181
 1848, see page 279
 1881, see page 288
 1894, see page 288
 2097, see page 702
 2268, see pages 192, 194
 2360, see page 296
 2362, see page 296
 2401, see pages 589, 590
 2442, see page 682
 2517, see page 126
 2518, see page 126
 2535, see pages 37, 39,
 286, 290, 400, 579,
 581, 588, 589, 590
 2631, see page 180
 2769, see page 702
 2772, see page 702
 2892, see page 292
 2896, see page 292
 2897, see page 292
 2901, see page 292
 2902, see page 292
 2903, see page 292
 2904, see page 292
 3037, see page 125
 3038, see page 126
 3157, see pages 63, 64,
 65, 66
 3549, see pages 680, 681
 3752, see page 703
 3771, see page 704
 4478, see pages 550, 555
 4710, see page 255
 4711, see page 255
 4712, see page 255
 5019, see page 396
 5039, see page 393
 5235, see pages 550, 551
 5605, see page 703
 5951, see page 59
 6290, see page 33
 6354, see pages 240, 241
 6362, see page 29
 6937, see pages 89, 93
- Section 7023, see pages 100, 101,
 102, 103, 104, 105,
 106, 107
 7030, see page 107
 7226, see pages 477, 478,
 482
 7227, see pages 476, 477,
 478, 479, 480, 481,
 482
 7228, see pages 477, 478,
 479, 481, 482
 7243, see page 478
 8378, see pages 512, 513,
 514
 9239, see pages 208, 211
 9371, see page 674
 9395, see page 674
 10294, see page 224
 10437, see page 520
 10440, see page 521
 10611 to 10614, see page
 605
 10615, see pages 600, 605
 10616, see pages 601, 605
 10617, see page 605
 10618, see pages 605, 606
 10619, see pages 605, 606
 10620, see pages 601, 606
 10776, see pages 524, 525,
 526
 10920, see page 54
 10922, see pages 50, 53, 54,
 56
 11335, see page 513
 11890, see page 647
 11894, see page 648.
 11900, see pages 647, 648,
 649
 ch. 2, art. 14, see page
 308
 ch. 36, art. 7, see page
 253, 255
 ch. 102, art. 7, see page
 600
 ch. 121, art. 3, see page
 646

Revised Statutes 1899

Section 9303, see page 33

Revised Statutes 1889

Section 7682, see page 33

Revised Statutes 1879

Section 6573, see page 224

Laws 1917

p. 10, sec. 22, see pages 51, 53, 54
 p. 21, sec. 59, see page 642.

STATUTES CITED AND CONSTRUED—Continued.

p. 114, see page 307
p. 145, see pages 540, 541
p. 513, sec. 3, see page 52
p. 516, sec. 11, see page 52
p. 524, see pages 348, 351
pp. 524-538, secs. 1-32, see page 380
p. 527, sec. 6, see page 375
p. 528, sec. 7, see page 375
p. 529, sec. 8, see page 375
p. 538, sec. 32, see page 375

Laws 1915

p. 9, see page 643
p. 313, see page 99
p. 314, sec. 1, see page 104
p. 316, sec. 7, see page 104
p. 318, sec. 15, see page 59
p. 319, sec. 17, see page 102

Laws 1913

p. 560, sec. 2, see page 493
p. 588, sec. 49, see pages 63, 65.
p. 602, sec. 68, see page 495
p. 610, sec. 72, see page 338
p. 721, see pages 175, 177, 179
pp. 721-2, see page 526
p. 722, sec. 3, see page 184
p. 723, sec. 4, see page 528
p. 723, sec. 6, see page 527
p. 772, see page 646
sec. 112, see page 111
sec. 114, see page 111

Laws 1911

p. 108, see pages 643, 653
p. 250, see pages 645, 655
pp. 250-254, see page 644
p. 373, see page 601
p. 374, see pages 601, 606
pp. 406-417, see page 643
p. 416, sec. 1, see pages 644, 655, 657
pp. 416-417, see page 643

Laws 1909

p. 438, see page 255

Laws 1907

p. 232, see page 477

Laws 1903

p. 209, see page 100

Laws 1897

p. 60, see page 570

Laws 1893

p. 186, see page 100

Laws 1891

p. 16, see page 646

STATUTES AND STATUTORY CONSTRUCTION.

1. **Superintendent of Schools: Traveling Expenses: Outside of State.**
 Since the Legislature appropriated money to pay the traveling expenses of the office of State Superintendent of Public Schools and the statute prescribing his duties says he shall have power "to in every way elevate the standard and efficiency of the instruction given in the public schools of the State" and further says that "all money reasonably expended in the execution of these duties shall, upon due proof," be allowed and paid by the State, the question of the necessity and expediency of incurring expense for this purpose, in the absence of statutory restriction, is to be determined by the Superintendent, and not by the State Auditor; and in consequence a reasonable expense account incurred by the Superintendent in railroad fares and hotel accommodations in attending an annual meeting, at Portland, Oregon, of the National Educational Association, composed of superintendents of public schools in all the States and of leading teachers and educators throughout the country and organized to promote, foster and encourage the cause of public education generally, should, upon the Superintendent's approval, be audited by the State Auditor for payment out of the moneys so appropriated, as an expense useful and properly to be incurred in the performance of the Superintendent's statutory duty "to elevate the standard and efficiency of the instruction given in the public schools of the State."

Held, by WALKER, J., dissenting, that the statutes contain no intimation of a requirement that the State Superintendent shall attend educational associations, and without a statute declaring, either in express terms or by reasonable implication, it to be his duty to attend national educational associations, the Legislature itself could not appropriate money to pay his traveling expenses in attending them. *State ex rel. Lamkin v. Hackmann*, 47.

2. **Public Service Commission: Grain Scales: Repeal of Prior Statutes.**
 The Public Service Act, by Section 49, Laws 1913, p. 588, invested the Commission with power to make an order for the erection and maintenance of track scales by a railroad company whenever public necessity therefor exists, and it repealed all prior statutes which interfere with the Commissioner's discretion to determine, in each individual case, the existence of the public necessity or public convenience. It repealed Section 3157, Revised Statutes 1909, which required a railroad company to erect and keep in good condition, for use in weighing grain shipped over its road, true and correct scales, at all stations from which the shipments for the previous year amounted to fifty thousand bushels or more. And an order of the Commission which requires such scales to be maintained at a certain station, based alone on said Section 3157 and a showing that for the previous year fifty thousand bushels were shipped from said station, without any further showing of public necessity or public convenience, is invalid. *State ex rel. Mo. Pac. Ry. Co. v. Pub. Serv. Com.*, 60.
3. **Life Insurance: Misrepresentation Statute: Simulated Applicant.**
 The statute (Sec. 6937, R. S. 1909) declaring that "no representation made in obtaining or securing a policy of insurance on the life" of any citizen of this State "shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due or payable," does not apply to a policy procured by one simulating the applicant. The statute was designed to lessen fraud, not to increase it. *Carter v. Ins. Co.*, 84.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

4. ———: ———: ———: **Interpretation.** The words of the statute limit the misrepresentations (1) to those expressed in the application "made in obtaining and securing" a valid policy, and (2) to matters which "actually contributed" to the insured's death. It does not render immaterial a concealed condition which, had it been made known at the time of the applicant's examination, would have precluded the issuance of the policy. *Ib.*
5. **Unconstitutional Amendment: Prior Statute Restored.** If an existing statute be amended, and be by the amendment rendered unconstitutional, the original statute, upon judicial declaration of invalidity of the amended statute, automatically comes into force again. *State ex rel. v. Clark, 95.*
6. **Insurance: Rating Act: Unconstitutional Amendment of 1903: Restoration of Prior Statute.** The statute of 1898 declared that no fire insurance policy should contain a clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" or "making provision for a reduction of the loss or damage by reason of a failure to take out or maintain other insurance." In 1903 the statute was amended by adding a proviso that the inhibition "shall not apply to policies issued upon personal property in cities which now contain or which may hereafter contain one hundred thousand or more inhabitants." *Held*, that, if the amendment had the effect to make the general inhibition a local or special law and for that or any other reason rendered the amended statute unconstitutional, the original act automatically came into force again, and if it was a valid enactment the general inhibition thereafter obtained. *Ib.*
7. ———: ———: **Repeal by Implication of Existing Statute: Inconsistency.** There is no inconsistency between the Insurance Rating Act of 1915 and Section 7023, Revised Statutes 1909, and consequently Section 7023 was not repealed by implication by said act. Section 7 of said act does say that a fire insurance company shall not "fix and charge any rate for fire insurance upon property in this State which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazards and having substantially the same degree of protection against fire," and Section 7023 declares that no insurance policy shall contain any clause "requiring the assured to take out or maintain a larger amount of insurance than that covered by such policy" except in cities having one hundred thousand inhabitants or more; but there is a difference in the hazards and the amount of protection in such cities and in other parts of the State, and said Section 7, when the words "charges and credits" are read in the light of the next clause, means that it is only when the hazards and the protection against fire are the same that discrimination in rates is forbidden. *Ib.*
8. ———: ———: **Class Legislation.** Other things being equal classification in legislation on the basis of population is not unconstitutional. *Ib.*
9. ———: ———: **Filing of Rate With Superintendent: Mandamus.** The court refuses to compel, by its writ of mandamus, the Superintendent of Insurance to file, approve and permit the use on all standard policies of fire insurance of what is called the "Reduced Rate Contribution Clause" presented by petitioners, because the statutes do not authorize the same reduction in rates throughout the State. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

10. **Costs: In Action for Damages.** Even though the petition in an action for damages contains two counts and the court gives a peremptory instruction to find for defendant on the first count, if the verdict and judgment are for plaintiff on the second count, it is the duty of the clerk to tax all the costs against defendant, for the statute (Sec. 2268, R. S. 1909) says that "in all actions not founded on contract, if the plaintiff recover any damages he shall recover his costs." The costs being so taxed, a motion to retax them implies a subsequent judicial investigation and determination by the court. *Burton v. Railroad*, 185.
11. **Public Service Act: Police Regulation: Legislative Delegation of Power.** The Public Service Act of 1913 and the fixing of reasonable rates to be charged by a public utility company are traceable to the police power of the State, and the Legislature can delegate to the Public Service Commission the power to ascertain and fix reasonable rates for services rendered to the public by divers public service corporations, subject to court review of the question of reasonableness. *State ex rel. v. Pub. Serv. Comm.*, 201.
12. **Intoxicated Passenger: Constitutionality of Statute: Unreasonable Burden Upon Conductor.** Sections 1 and 2, Laws 1909, page 438 (Secs. 4710 and 4711, R. S. 1909), making it unlawful for any person to enter a passenger train intoxicated or to drink intoxicating liquors on such train, and imposing a fine upon the person guilty of such offense, and making it the duty of the conductor to report to the prosecuting attorney the name of the person so intoxicated and of three witnesses, and subjecting him to a fine for his failure to do so within five days, are not directed to the railroad company, but are directed to the intoxicated or drinking passenger and the conductor; and hence the railroad company is not in a position to assert that they impose unreasonable and arbitrary duties upon the conductor and for that reason are violative of the due-process and equal-privilege clauses of the Constitution. *Lige v. Railroad*, 249.
13. ———: ———: **Unequal Operation: Exception of Dining and Private Cars.** The Act of 1909, page 438 (Secs. 4710, 4711, and 4712, R. S. 1909), making it unlawful for any person to enter a passenger train or car intoxicated or to drink intoxicating liquor on said passenger train or car or to exhibit or carry exposed any intoxicating liquor while on said passenger train or car, but excepting dining cars or private cars from the act's operation, does not operate equally and alike upon all subjects similarly situated, and is therefore clearly unconstitutional. There is no substantial or reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars on the other, and as the statute has no reasonable basis for a separation of them into different classifications it violates those provisions of Section 53 of Article 4 of the Constitution of Missouri and of the Fourteenth Amendment of the Constitution of the United States which prohibit the enforcement any State law which denies the equal rights or abridges the privileges and immunities of citizens of the United States. *Ib.*
14. **Constitutional Law: Descents and Distributions: Wills.** There is no constitutional provision restricting the power of the Legislature to change or modify the laws relating to descents and distributions or the laws relating to wills. *State ex rel. McClintock v. Guinotte*, 298.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

15. ———: ———: **Repeal of Conflicting Statutes.** The fact that the Act of 1917 designates the portion of an inheritance which the State is to retain or collect as a tax and that it does not in express words repeal statutes relating to descents and distributions or wills, does not make it an exercise of the taxing power. In spite of those things, it operates to repeal so much of those statutes as conflict with it. *Ib.*
16. ———: ———: **Title Act: Repeal of Conflicting Existing Statutes.** The title of the Inheritance Law of 1917 is in all respects sufficient, although the body of the act modifies or repeals, not by express words but by affirmative provisions, certain conflicting portions of the statutes relating to descents and wills, and no reference is made to them in the title. The body of the act is within the purview of the title and is clearly indicated by it, and that is sufficient; and that being true, so much of the existing statutes as conflict with it will be held to be to that extent repealed or modified. *Ib.*
17. ———: ———: **Local or Special Law.** The Inheritance Law of 1917 is a general and not a special or local law. *Ib.*
18. **Scire Facias: Forfeited Bond: Civil Action.** A *scire facias* proceeding on a forfeited bond, in so far as the nature of the proceeding itself is concerned, is a civil action, the bond or recognizance being nothing more than a formal confession of debt. Therefore a literal compliance with the statute requiring a bond to be taken for a bailable offense is not necessary, but the statute will be so construed as to effectuate the purpose for which it was enacted. *State v. Allen*, 391.
19. ———: ———: **Bond to Appear at Same Term.** A bond given by an accused for his appearance from day to day during the June term of court then in session and from day to day during the next September term, which was not a term designated by the statute, but a part of the June term, notwithstanding the statute says a recognizance shall be taken for his appearance "on the first day of the next term," is enforceable against the surety upon default of the accused to appear at the September term; such statute, not being penal in so far as the *scire facias* proceeding is concerned, is not to be construed according to its strict letter, but in a manner to effectuate the purpose for which it was enacted, which was to secure the presence of the accused in court by authorizing him to substitute his voluntary contractual obligation for his physical custody. *Ib.*
20. ———: ———: **Statute of Jeofails.** The Statute of Jeofails (Sec. 5019, R. S. 1909), declaring that no proceeding upon a recognizance shall be defeated on account of any defect in form, or omission of recital or condition of undertaking therein, or other irregularity, is a part of the statute authorizing the giving of bonds or recognizances and requires said latter statute to be liberally construed in a manner to effect its purpose to secure the appearance of the accused for trial at the time specified. *Ib.*
21. **Unconstitutional Statute: Application.** A statute may be unconstitutional as to part of its subject-matter and valid in its application to other parts. *State v. Koontz*, 475.
22. **Intoxicating Liquor: Delivery by Purchaser's Agent.** Section 2 of the Act of 1907 (Sec. 7227, R. S. 1909) made unlawful the transfer of the possession of intoxicating liquor from one person

STATUTES AND STATUTORY CONSTRUCTION—Continued.

to another, in a Local Option county, when by the act of transfer there was no change of ownership. That section made the delivery to the purchaser by the purchaser's own agent a violation of its provisions. *State v. Koontz*, 475.

23. ———: ———: **Direct Delivery to Purchaser by Carrier.** Section 7228, Revised Statutes 1909, is an exception to the operation of Section 7227, and relieves of its unlawful character the delivery of intoxicating liquor by one person to another in a Local Option county, where the deal, or order, is direct between the seller outside and the purchaser inside such county, and where the agency of no person who would profit by the traffic except as a common carrier intervenes between such seller and purchaser. *Ib.*
24. **Public Utility: Definition: For Public Use Understood.** While the statute defining an "electrical corporation" and an "electric plant" does not contain the words "for a public use," they are to be understood and to be read into it. An electric plant must of necessity be devoted to a public use before it is subject to public regulation. *State ex rel. Danciger v. Pub. Serv. Comm.*, 483.
25. **Ordinance: Arbitrary Will of Officer.** Neither the Legislature nor the city can commit to the unrestrained will of a single officer the power arbitrarily to favor one individual in the use of streets and to deny such favor to others. *St. Louis v. Allen*, 501.
26. ———: ———: **Drivers: Obedience to Direction of Police.** An ordinance declaring that "drivers must at all times comply with any direction by voice or hand of any member of the police force, as to stopping, starting, approaching or departing from any place" puts the citizens in the arbitrary power of the police officer regardless of the circumstances of the case, is subject to the objection that it deprives persons of equal protection of the laws, and is invalid; and however meritorious may be the city's case against an offender, he cannot be convicted of its violation. *Ib.*
27. **Taxation: Lots Leased for Military Purposes: Exception.** The statute (Sec. 8378, R. S. 1909) providing that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease and use" contains no exception, and if it is not in conflict with the constitutional provision which exempts property "of the State" and declares that all laws exempting property other than that enumerated shall be void, property leased for the National Guard is not subject to taxation, whether it is used exclusively for such purpose or not. *State ex rel. v. Fleming*, 509.
28. ———: ———: **Exception as to Exclusive Use.** The decisions which hold that property is not exempt from taxation unless used "exclusively" for educational, charitable or religious purposes, are not controlling in determining whether buildings leased by the State for military purposes shall be exempt, because they interpret a statute requiring such "exclusive use," whereas the statute concerning the leasing of property for military purposes contains no such provision. *Ib.*
29. ———: ———: **Buildings Mean Lots.** The evident intention of the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease or use" was that the lot upon which the buildings are situated should be exempt. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

30. ———: ———: **Constitutionality of Statute: Not Decided.** Where in the suit for taxes the defendant pleaded that the lots were exempted by the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes," and the plaintiff did not plead that such statute is unconstitutional, the court is not called upon to rule that such statute is violative of the provision of the Constitution which exempts property "of the State" and certain other property enumerated and declares that all laws exempting property other than that enumerated shall be void. *Ib.*
31. **Public Road: Necessity: Established Cross Road.** The existence or nonexistence of a parallel road one half mile distant from the proposed road, and whether it has been established by dedication or general use, or has a definite location, is not conclusive of the public necessity of the proposed road. Under the statute (Sec. 10437, R. S. 1909) the public necessity of a proposed road does not depend upon a showing that no other possible egress or ingress for the public use exists. In *Matter of Critzer*, 514.
32. **Consolidated School District: Valid Statute.** Section 10776, Revised Statutes 1909, is a valid enactment and applicable to "school districts that may be hereafter organized under the laws of this State," and is therefore applicable to a consolidated school district organized in pursuance to a subsequent statute. *State ex inf. v. School District*, 522.
33. ———: **Forfeiture of Franchise: Failure to Maintain Eight Months' School.** Section 10776, Revised Statutes 1909, declaring that "whenever any school district . . . shall fail or refuse, for a period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body," was only intended to affix a forfeiture for failure to provide an eight months' school when such omission did not result from inability to have so long a term, or where the failure was purposeful or intentional on the part of the school district. It has no application to a consolidated school district to which, during the pendency of litigation in which the validity of its organization is drawn in question, the county officers refuse to credit or pay the school taxes, and which because of those facts is unable to conduct a school, but nevertheless in entire good faith endeavors, as far as possible, to exercise its corporate franchise. *Ib.*
34. ———: ———: **Failure to Maintain Elementary Schools.** The terms of Section 4 of the Act of 1913 (Laws 1913, p. 723), making it the duty of a consolidated school district to maintain an elementary school within a named distance of pupils, in case no transportation is provided for, do not condition an automatic forfeiture of the district's corporate franchise upon its non-observance, and the courts will not make a failure to observe its requirements a ground of forfeiture. [*Criticizing State ex rel. v. School District*, 195 Mo. App. 507.] *Ib.*
35. **Constitutional Law: Hospital Act: Purpose.** The Act of 1917 (Laws 1917, p. 145) authorizing counties to establish and maintain public hospitals, and to levy a tax and issue bonds therefor, has for its primary purpose, as shown by its terms, the providing for the construction of public county hospitals and the creation of a public debt for that purpose. The rate of taxes to

STATUTES AND STATUTORY CONSTRUCTION—Continued.

be levied for the purpose of paying the debt was not the main purpose nor a vital element of the act. *State ex rel. v. Hackmann*, 534.

36. ———: ———: **Rate to Pay Debt: Self-Enforcing.** That part of the Constitution requiring a municipality, when creating a debt beyond the income and revenue of the current year, to "provide for the collection of an annual tax sufficient to pay interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years," is self-enforcing, and is effective without legislative action. *Ib.*
37. ———: ———: **Limited to Two Mills Tax.** So much of the County Hospital Act of 1917 as undertook to fix a maximum rate of two mills on the dollar-valuation of property as the tax to be levied to pay the bonds was a work of supererogation, since the Constitution itself requires "an annual tax sufficient" to pay the interest and principal of the debt within twenty years, which is as much a part of the act as if it had been written into it. If the rate of two mills on the dollar is sufficient then it is a valid rate; and if not sufficient, then the limitation to two mills is harmless, because the constitutional requirement *proprio vigore* was substituted for it. *Ib.*
38. ———: ———: **Limitation of Tax Rate: Separate From Rest of Act.** Where some portions of a legislative act are invalid and, after they are separated from what is valid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted had it known that the excised portions were invalid, the act will be upheld. It is apparent from the terms of the County Hospital Act of 1917 that the Legislature would have enacted it had it contained no provision limiting the rate of taxation to pay the bonds to two mills on the dollar; and disregarding all its provisions relating to the rate of taxation, since the Constitution itself supplies them, a valid and complete act remains. *Ib.*
39. ———: ———: **Anticipation of Revenue.** The County Hospital Act of 1917 was not enacted in pursuance of the powers or with reference to the objects specified in Section 11 of Article 10 of the Constitution, and hence it is not invalid as an attempt to authorize the issuance of bonds in anticipation of collection of increased rate of taxation. *Ib.*
40. **Road District Bonds: Validity: Collateral Matters: Plans of Construction, Etc.** Those parts of the statute (Sec. 10618, R. S. 1909) requiring the commissioners of a road district to employ an engineer to draw plans, advertise for bids and enter into a contract for the construction of the roads, relate to matters preliminary and collateral in their nature, over which a bona-fide purchaser of the district's bonds has no control, and hence they do not affect their validity. *Rose v. Road District*, 590.
41. ———: ———: **Derelictions of Contractor.** The bona-fide purchaser of road district bonds cannot be held responsible for the failure of the contractor, over whom he had no control, with whom he had no contract and was not in privity, to complete the work within the time required by his contract, or to surface the road the agreed depth with crushed stone, or because he abandoned the contract before the work was completed. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

42. ———: ———: **Certification of Amount.** The proviso of Section 10620, Revised Statutes 1909, as amended in 1911, requiring the commissioners of a road district, after its bonds have been issued and attested, to "make out and certify to the county clerk a statement of the amount of the bond issue, and a description of each tract of land within a certain distance of the proposed road, and acknowledge and file the same with the county clerk," can only be complied with after the bonds have been issued, and a failure to comply with it does not affect the validity of the bonds. *Ib.*
43. **Fund Commissioners: Power to Contract.** Section 11900, Revised Statutes 1909, which authorized and empowered the Board of Fund Commissioners "to enter into contracts, and to refund any part of the bonded indebtedness of the State," when read in connection with Section 11890, which authorized them to "perform all such acts and things as may be required of them by law," and the amendment of 1913 to Section 11900, which "authorized and empowered" said board "to enter into contracts and to refund," did not restrict their duties to refunding bonds, but authorized them to make contracts for the sale of Capitol bonds authorized by the Act of March 16, 1911.
Held by WALKER, J., dissenting, with whom BOND, C. J., and WOODSON, J., concur, that neither said statutes nor any other invested the board with authority to contract to pay for a plan to sell bonds voluntarily submitted to it and never accepted. State ex rel. Kelly v. Hackmann, 636.

STREAMS, OVERFLOW WATER. See *Damages*, 15 and 16.

STREETS AND ALLEYS. See *Cities and Towns*, 6 and 7.

SURFACE WATER. See *Damages*, 15 and 16.

TAXATION OF INHERITANCES. See *Inheritances*.

TAXES AND TAXATION.

1. **Payment of Taxes: By Whom: No Showing: Presumption.** In the absence of evidence on the subject, the court has a right to presume that the record owner of the land paid the taxes from the time the patent was issued in 1859 up until it was sold for the taxes of 1889, although such record owner is not shown to have been at any time in actual possession. The burden is upon the purchaser at the tax sale to show that the record owner had not paid the taxes prior to his purchase. *Bell v. George, 17.*
2. **Plat Book: Uncertified: Relied On to Show Owner of Land.** An uncertified plat book, purporting to have been made by the proper United States land office, is not competent evidence for any purpose; and, although such plat book shows the lands were entered by a certain person in 1857, and the patents, which were not recorded in the county where the lands are situate, show they were issued to the assignee of said entryman in 1859, the Collector of the Revenue is not authorized to rely upon such uncertified plat book in ascertaining the owner of the land, where the statute requires the suit to be brought against the owner of the land. *Ib.*
3. **Convict: Sale of Land for Taxes: Void Judgment.** A judgment for taxes obtained against an owner of land incarcerated in the Penitentiary is void and a sale under execution does not affect the legal title. The statute specifically declares that a convict "shall be deemed civilly dead" during the term of his sentence, but it

TAXES AND TAXATION—Continued.

also says he "is and shall be under the protection of the law" and provides for the appointment of a trustee to "prosecute and defend all actions commenced by or against the convict;" and if the State, instead of pursuing the course thus provided by the statute, proceeds against him directly for the taxes due from his land at a time when he cannot be haled into court, the judgment does not affect the legal title. *Murphy v. Barron*, 282.

4. **Inheritance Tax.** The right of the State to foreclose absolutely or partially the right to inherit property, by law or will, and to say what is to become of it when death forecloses the owner's right to control it, is not strictly the exercise of the taxing power, although the percentage to be retained by the State is designated in the statute as a tax, but is the exercise of that other power which inheres in sovereignty, unless restricted by the Constitution, to say what shall be done with the property upon the owner's death. The designation of the portion to be retained or collected by the State as a tax is, in effect, an expression of the condition upon which the persons designated in the statutes of descents and distributions or in the testator's will may take the property, and is not a tax at all. *State ex rel. McClintock v. Guinotte*, 298.
5. ———: **Constitutional Restrictions.** Since a statute prescribing the amount of inheritance taxes shall be imposed on devises or inheritances is not an exercise of the taxing power, the validity of the statute is not affected by the divers and sundry constitutional restrictions relating to taxation. *Ib.*
6. ———: **Due Process.** An inheritance law, which requires the probate court to appraise the property owned by a decedent, and to exempt \$15,000 of that devised to or inherited by his widow and \$5,000 of that devised to or inherited by each of his children, and requires an appropriation by the State of certain graduated percentages of the balance, as a condition of their receiving the inheritances or devises, not being an exercise of the power of taxation, does not in any sense deny to them due process of law. *Ib.*
7. ———: **Payment into State Treasury.** Devisees or heirs, whose inheritances or devises have by the probate court been charged by its judgment with taxes according to the Inheritance Law, are not, in a *certiorari* to that court, by which they attack the constitutionality of said act, in any position to raise the point that the act violates that portion of the Constitution which provides that no money shall be diverted from the State Treasury except by proper appropriation bills. Whether that portion of the act requiring the money to be paid into the State Treasury and providing that upon proof of an erroneous payment the amount of the tax erroneously paid may be refunded, is valid or invalid, does not concern them, and is not in the case, and therefore is not decided, for even if that part of the act is invalid the rest of it is not. *Ib.*
8. ———: **Graduated: Unnatural Classification: Public Welfare.** The classifications made by the Inheritance Law of 1917, which exempts from the tax \$15,000 of decedent's property for the widow and \$5,000 for each child, and fixes a tax of one per cent on the balance up to \$20,000, and a tax of two per cent on the next \$20,000, and a tax of three per cent on the next \$40,000, and larger percentages, by a graduated scale, on larger amounts, is not unreasonable. The reasonableness of a classification is to be

TAXES AND TAXATION—Continued.

measured in the light of modern public welfare, and that may require a graduation of the tax in proportion to the amount of property given to the legatees or heirs by the State, which has the power to appropriate the whole of decedent's property upon his death. A law which classifies the recipients of the State's favor according to the amounts received is not an unreasonable classification. *Ib.*

9. ———: **Taxation on Property: Uniform: According to Value: Public Purpose.** The Inheritance Law of 1917 is not an exercise of the taxing power of the State; but even if it be the exercise of the taxing power, it is not a tax upon property, but a tax upon the transmission or succession of property upon the death of the owner, and not being a tax upon property it does not violate the constitutional provision declaring that taxes can be levied only for a public purpose, or the provision that taxes shall be uniform upon the same class of subjects, or the provision that all property subject to taxation shall be taxed in proportion to value. *Ib.*
10. ———: **Classification According to Burden.** There can be a class within a class, and a classification by an inheritance law of recipients of a decedent's property according to amounts received and kinship is not unreasonable. Property passes upon the owner's death to others only by the grace of the State, and if the burdens imposed as a condition of succession be graduated according to amounts received or relationships to him they do not constitute an unconstitutional classification, even though they be imposed by an exercise of the taxing power. But the provisions of the Constitution concerning taxation have reference to those burdens or taxes fixed by law which are recurrent at fixed periods, not to duties imposed which occur only once, and hence they are not applicable to what is ordinarily denominated an inheritance tax. *Ib.*
11. **Income Tax: In Proportion to Value: Property.** A tax on income is not, in the constitutional sense, a tax on property, and hence the provision of the Constitution requiring that "all property subject to taxation shall be taxed in proportion to value" does not render invalid the Income Tax Law of 1917 which imposes a tax upon "the income of a taxable person." The word "property" in that clause was meant to include only those distinct classes of property which, because of their peculiar nature can be measured in value, become the object of taxation independent of the owner, and are susceptible by proper procedure, to lien or seizure for the enforcement of the tax. Prior to the adoption of the Constitution of 1875 the word "property," by judicial decision, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges and similar sources of revenue, and when used in said Constitution it was not intended to include the usufruct of property, nor the earnings of physical or mental labor.
Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is property and a tax on incomes is a direct tax on property. Income is always paid in money or kind, that is, in real or personal property from which it accrues. Net income is the original and sole source of all existing private property. The very meaning of the word income is that it is "that gain which proceeds from labor, business, property or capital of any kind;" and this is substantially the definition given, in more elaborate words, in the Income Tax Act of 1917. A tax upon income accruing

TAXES AND TAXATION—Continued.

out of real or personal property is a tax upon such property itself; and an income arising from labor is money, which is property, and hence a tax on such income is a tax on property. *Wire Co. v. Wollbrinck*, 339.

12. ———: ———: **Prior Definition; Adoption.** Words and their context used in a prior constitution and construed by the highest court, when employed in a later constitution, are presumed to have been adopted with their adjudicated meaning, unless a contrary intention is manifest; and, hence, the word "property" used in the provision of the Constitution of 1875 which requires all property to be taxed in proportion to its value, having been used in similar sections of the two previous constitutions and having been construed by the Supreme Court not to include incomes, was used in the same sense and meaning in which, by judicial construction, it had been previously employed.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Constitution of 1865 contained no provision requiring taxes to "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," nor did it contain any provision conferring the power of taxation upon the Legislature, but assumed that such power was inherent; and while the Constitution of 1875 also assumed that the power of taxation was inherent in the Legislature, that power was carefully limited and restricted, among other things, by clauses (a) which required the tax to be uniform and (b) inhibiting the enactment of laws exempting any property from taxation except certain property specifically enumerated. *Ib.*

13. ———: ———: **Income as Intangible Property.** That income is property, and that a taxation of income from land or invested personality is, in effect, a taxation of the thing producing the income, does not render a statute imposing a tax on incomes violative of the provision of the Constitution which declares that all property shall be taxed in proportion to value. Those considerations do not alter the fact that incomes are distinguishable from the tangible or intangible property yielding them.

Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that income is not an intangible entity which the State may tax in a transmutation stage, after its production but pending its fixed investment in or transformation into some other sort of property. *Ib.*

14. ———: **Exemptions.** Since the limitations of the Constitution relating to *ad valorem* taxation upon property have reference solely to tangible and specific lands and personality, the excluded classes of property embracing incomes are not within its regulative provisions specifying what property shall be exempt from taxation.

Held, by FARIS, J., dissenting, with whom WOODSON and WILLIAMS, JJ., concur, that the Income Tax Act, which exempts from the tax incomes of unmarried persons to the extent of \$3,000 and of married persons to the extent of \$4,000, and imposes the tax upon all sums in excess of said amounts and on the entire income of business corporations, is violative of that clause of the Constitution which says that "all laws exempting property from taxation" other than property used exclusively for religious worship, schools or purposes purely charitable "shall be void," and, besides, in so doing, violates the other clause which says that taxes "shall be uniform upon the same class of subjects." *Ib.*

TAXES AND TAXATION—Continued.

15. ———: **Uniformity: Classification: Graduation.** The Constitution does not prescribe uniformity of taxation as to any subject-matter of taxation except property in the constitutional sense, which does not embrace incomes. The provision of the Constitution which requires taxes to "be uniform upon the same class of subjects" recognizes the power of the Legislature to classify the subjects falling within its restriction, and only requires that the tax shall be uniform upon the classified persons, or the classified subjects of taxation. Since the Income Tax Act of 1917 classifies persons, corporations and entities, and provides a classification, as to amount, of the portion of the net income of each class of persons, corporations and entities which it makes subject to the tax, and further provides for the payment of an identical rate of taxation by each of the classes made subject to the burden, and requires each person, corporation or entity to pay the same tax which is to be paid by every other person, corporation or entity belonging to the class, it does not violate the constitutional rule of uniformity. The Legislature, by the express constitutional terms, had the power to create the classification of the distinct subjects contained in the act.

Held, by FARIS, J., dissenting, with whom WOODSON, J., concurs, that the Income Tax Act is (a) a revenue measure purely; (b) the tax it imposes is not an occupation tax, because, while it taxes incomes derived from labor, trades, business and professions, it also taxes incomes from rents on land and interest from bonds, money loaned and all other income from either real or personal property; (c) it is not a license law, imposing a license tax, for no regulation or the exercise of the police power is involved; (d) it imposes a direct tax, in contradistinction to an indirect tax, because the tax is demandable and collectible from the identical person against whom it is levied; and (e) since income is property it is a direct property tax, or a direct tax upon property. Said act, therefore, violates the constitutional rule that taxes "shall be uniform upon the same class of subjects," because: (1) incomes of unmarried persons less in amount than \$3,000 are not by it taxed at all; (2) incomes of married persons less than \$4,000 in amount are not taxed at all; (3) incomes from realty and personalty are, in effect, taxed at the rate of 35 cents on each \$100 thereof; (4) incomes from labor and professions are taxed at the rate of 50 cents on the \$100 thereof; (5) incomes of business corporations are taxed on the total amounts thereof, without any exemption whatever; and (6) incomes from numerous alleged educational, fraternal, charitable, benevolent, agricultural and religious corporations and associations, not enumerated in the constitutional exemption list, are wholly exempt from the tax, and therefore (in which WILLIAMS, J., also concurs) these exemptions are violative of the clause of the Constitution which says that "all laws exempting property from taxation, other than the property above enumerated, shall be void," and the exemptions contravene the rule of uniformity prescribed by the Constitution. The word "uniform" used in the Constitution means "conforming to one rule, not varying or variable;" and whether an income tax is a property, or a license, or an occupation tax, the Constitution requires it to be uniform in its burdens upon the same class of subjects, that is to say, upon incomes; and no more permits a graduated tax on incomes than a graduated tax on property. *Id.*

TAXES AND TAXATION—Continued.

16. ———: ———: **In Excess of Property Taxes.** Section 32 of the Income Tax Law of 1917 is not unconstitutional because it creates a class consisting of persons whose income taxes exceed those paid on their real and personal property and imposes a tax on their incomes to the extent that their income taxation exceeds their property taxation. Persons belonging to such a class occupy a relation of support to the State reasonably distinguishable from others who pay taxes only on their income, and therefore such a classification does not contravene the constitutional requirement that taxes shall be uniform on the same class of subjects. [FARIS, WOODSON and WILLIAMS, JJ., dissenting.] *Wire Co. v. Wollbrinck*, 339.
17. ———: ———: **U. S. Constitution.** The Income Tax Act of 1917 does not contravene the Fourteenth Amendment of the U. S. Constitution. The State has the freedom of a sovereign both as to the objects and methods of taxation. *Ib.*
18. **Lots Leased for Military Purposes: Exception.** The statute (Sec. 8378, R. S. 1909) providing that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease and use" contains no exception, and if it is not in conflict with the constitutional provision which exempts property "of the State" and declares that all laws exempting property other than that enumerated shall be void, property leased for the National Guard is not subject to taxation, whether it is used exclusively for such purpose or not. *State ex rel. v. Fleming*, 509.
19. ———: **Exception as to Exclusive Use.** The decisions which hold that property is not exempt from taxation unless used "exclusively" for educational, charitable or religious purposes, are not controlling in determining whether buildings leased by the State for military purposes shall be exempt, because they interpret a statute requiring such "exclusive use," whereas the statute concerning the leasing of property for military purposes contains no such provision. *Ib.*
20. ———: **Buildings Mean Lots.** The evident intention of the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes during the period of such lease or use" was that the lot upon which the buildings are situated should be exempt. *Ib.*
21. ———: **Constitutionality of Statute: Not Decided.** Where in the suit for taxes the defendant pleaded that the lots were exempted by the statute declaring that "all buildings leased by the State for military purposes shall be exempt from taxation for all purposes," and the plaintiff did not plead that such statute is unconstitutional, the court is not called upon to rule that such statute is violative of the provision of the Constitution which exempts property "of the State" and certain other property enumerated and declares that all laws exempting property other than that enumerated shall be void. *Ib.*
22. **Premature Suit.** A suit filed in December, 1913, for the taxes assessed in 1912, which were payable in 1913, is premature, because the taxes were not delinquent until January, 1914. *Ib.*
23. **Contributory Negligence: Instruction: Burden: Restriction to Plaintiff's Evidence.** Under the Federal Employers' Liability Act an instruction for plaintiff which places upon the defendant the burden of proving contributory negligence is not error. Nor under the circumstances of this case can defendant complain that to such

TAXES AND TAXATION—Continued.

instruction was not added the clause: "unless the jury find from plaintiff's own evidence and the witnesses introduced by him that he was guilty of contributory negligence." The instruction given did not specify what things were done or known by plaintiff, and if defendant desired an amplification or qualification of it in order to present its contention to the jury, it was its duty to ask a proper instruction, appropriate to the evidence and pleading, presenting that view. *Ib.*

24. ———: ———: **Pleading: Proof.** If contributory negligence is not pleaded an instruction presenting it as a defense should not be given; and if pleaded and there is no evidence to support the plea, no instruction on the subject should be given. Where defendant's only plea of contributory negligence was that, if plaintiff was injured, it was the result of his own negligence in attempting to climb on a moving freight train without properly using the stirrup, an instruction declaring that he was guilty of contributory negligence if he did not intelligently use the means at hand to ascertain if there were any pitfalls or obstacles on the right-of-way against which his feet might strike as he attempted by grasping the stirrup to mount the moving car, would have been improper. *Ib.*
25. **Negligence: Obstacle Beside Track.** Where it is necessary for a brakeman of a freight train, in order to mount a moving car, to grasp an iron stirrup or hand-hold while running along-side the car, he is authorized in assuming that the right-of-way is clear of obstructions, such, for instance, as a keg of railway spikes. *Ib.*
26. **Verdict: Excessive: \$10,772: Simulated Injuries.** Where there is substantial evidence that plaintiff's injuries resulting from the accident were a bruise on the thigh and back, hydrocele of the right testicle, rupture of a ligament of the cervical vertebrae resulting in the depression of the seventh vertebra, an injury to the spinal cord, paralysis of the lower limbs involving the motor and sensory nerves, a subluxation of the lumbar vertebrae, anesthesia of the muscles and nerves of the back extending from the shoulders to the waist line, a loss of the reflexes of the knees and feet, traumatic neurasthenia, and that the injuries are progressive and permanent, the court cannot say, even though other medical experts gave contradictory testimony, that the injuries are feigned, or that a verdict for \$10,772 is excessive. *Ib.*
27. **Expert Testimony: Conclusion.** Where the hypothesis is based upon an established fact that plaintiff received certain injuries on a given date, it is not prejudicial error to permit the expert witness to testify that the condition will be progressive and he will be rendered helpless, if the testimony is followed by an instruction that "the opinions of expert witnesses neither establish nor tend to establish the truth of the facts upon which they are based," and similar testimony was admitted without objection. *Ib.*
28. ———: ———: **Waiver.** A litigant will not be heard to complain of the admission of advisory expert testimony over his objection, where evidence of the same tenor has been admitted without his objection. *Ib.*
29. **Constitutional Law: Hospital Act: Purpose.** The Act of 1917 (Laws 1917, p. 145) authorizing counties to establish and maintain public hospitals, and to levy a tax and issue bonds therefor, has for its primary purpose, as shown by its terms, the providing for the construction of public county hospitals and the creation of a public debt for that purpose. The rate of taxes to be levied for

TAXES AND TAXATION—Continued.

- the purpose of paying the debt was not the main purpose nor a vital element of the act. *State ex rel. v. Hackmann*, 534.
30. ———: ———: **Rate to Pay Debt: Self-Enforcing.** That part of the Constitution requiring a municipality, when creating a debt beyond the income and revenue of the current year, to "provide for the collection of an annual tax sufficient to pay interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years," is self-enforcing, and is effective without legislative action. *Ib.*
31. ———: ———: ———: **Limited to Two Mills Tax.** So much of the County Hospital Act of 1917 as undertook to fix a maximum rate of two mills on the dollar-valuation of property as the tax to be levied to pay the bonds was a work of supererogation, since the Constitution itself requires "an annual tax sufficient" to pay the interest and principal of the debt within twenty years, which is as much a part of the act as if it had been written into it. If the rate of two mills on the dollar is sufficient then it is a valid rate; and if not sufficient, then the limitation to two mills is harmless, because the constitutional requirement *proprio vigore* was substituted for it. *Ib.*
32. ———: ———: **Limitation of Tax Rate: Separate From Rest of Act.** Where some portions of a legislative act are invalid and, after they are separated from what is valid, a law in all respects complete and susceptible of constitutional enforcement is left, which the Legislature would have enacted had it known that the excised portions were invalid, the act will be upheld. It is apparent from the terms of the County Hospital Act of 1917 that the Legislature would have enacted it had it contained no provision limiting the rate of taxation to pay the bonds to two mills on the dollar; and disregarding all its provisions relating to the rate of taxation, since the Constitution itself supplies them, a valid and complete act remains. *Ib.*
33. ———: ———: **Anticipation of Revenue.** The County Hospital Act of 1917 was not enacted in pursuance of the powers or with reference to the objects specified in Section 11 of Article 10 of the Constitution, and hence it is not invalid as an attempt to authorize the issuance of bonds in anticipation of collection of increased rate of taxation. *Ib.*

TELEPHONE RATES. See **Public Service Commission.**

THEATERS.

1. **Moving Picture Theater: Duty of Owner to Patrons.** It is the duty of the owners and operators of a moving-picture theater to see that the place to which they invite their patrons is reasonably safe for use for the purposes for which it was designed. *Oakley v. Richards*, 266.
2. ———: **Step-Off in Floor: Absence of Light.** It is a matter of common knowledge that a four-inch depression in a floor is sufficient to cause one to fall who, in the absence of light and knowledge of the depression, steps into or upon the edge of it. So that where the floor upon which were the seats of the moving picture theater was four inches above the aisle, which fact plaintiff did not know, and there was not sufficient light to enable her to see the depression, which brought about her fall, the concurrence

THEATERS—Continued.

of the two constituted negligence, and the jury was warranted in finding that her fall was due to her inability to see the step-off on account of the darkness. *Ib.*

3. ———: ———: **Contributory Negligence.** Patrons having been invited to enter and leave the moving-picture theater at will during performances, it cannot be said, as a matter of law, that a patron seeing others using the aisle, which was four inches below the floor on which the seats rested, was guilty of contributory negligence in failing, in the absence of knowledge of the step-off and of sufficient light to enable her to see it, to apprehend that the usual path of exit contained an unsafe place or pitfall. The question was one for the jury. *Ib.*
4. ———: **Amending Petition After Proof: Changing Defense: Permissive Ordinance.** Where the petition charged that a designated ordinance prohibited inequalities in the floor levels of a theater and a violation thereof, and the answer set up another ordinance containing a like prohibition but subject to exception on written permission of named officials and contained an averment of such permission, and defendant's own evidence totally failed to show any such permission, it was not error to permit plaintiff, after the evidence was in, to amend her petition by interlineation to conform to the proof by adding a charge that the ordinance pleaded by defendant had been violated. The amendment to the pleading did not change the defense, and was right. *Ib.*
5. ———: **Floor Level: Inequalities Upon Permission: Inspection.** Where the ordinance declared that "no steps shall be permitted in any aisle or in any part of the auditorium floor" of a theater "except by written permission" of named officials, permission cannot be implied from a mere inspection by such officials. *Ib.*
6. ———: **Validity of Ordinance: Steps in Aisle: Permission of Officials.** An ordinance prohibiting steps in the aisle or on any part of the auditorium floor of a moving-picture theater "except by written permission" of designated officials does not vest an arbitrary power in said officials and is not for that reason invalid. In case a city may prohibit a particular thing, it validly may prohibit it except in case a permit is procured from a designated official; and a city may lawfully prohibit absolutely inequalities in floor levels in darkened theaters, and matters of detail in enforcing ordinances otherwise valid may be left to designated officials. *Ib.*
7. **Picture Theater: Step-Off in Aisle: Assumption of Risks.** Where the petition charged that the aisle of a moving-picture theater was four inches lower than that part of the floor on which the seats rested, that such step-off was in violation of a designated ordinance, that such construction was negligence, that plaintiff had no knowledge of such step-off and that there was not sufficient light to enable her to see it, an instruction on the assumption of risks which ignores such allegations is properly refused. *Ib.*
8. ———: ———: **Custom: Contrary to Ordinance.** Custom is no defense to a violation of positive law. Where plaintiff was injured by falling as she attempted to leave her seat in a moving-picture theater, whose aisle was four inches below the auditorium floor, and which construction was in violation of a city ordinance, it was not error to instruct the jury that the fact that the owners of other theaters permitted similar inequalities in the floor constituted no defense. *Ib.*

THEATERS—Continued.

9. ———: ———: ———: **Proof.** Evidence that about one out of ten theaters in the city had steps from the auditorium floor to the aisle does not prove a customary construction. *Oakley v. Richards*, 266.
10. **Difference in Floor Levels: Practicable Construction: Expert Testimony.** It was not error to permit an expert to testify that it was practicable to overcome differences in floor levels in theaters by gradients and inclined planes. It cannot be said as a matter of law that such methods of construction are so practicable that a jury are as capable of drawing correct conclusions on the subject as is an expert. *Ib.*

TIMBER. See **Trespass.**

TRAVELING EXPENSES OF OFFICERS. See **Schools**, 1.

TRESPASS.

Cutting Timber: Mere Licensee: Affirming Decision of Court of Appeals.

The decision of the Court of Appeals, 187 Mo. App. 373, holding that a certain consent decree between plaintiff and the apparent record owner of land gave to plaintiff something more than a personal license to cut, but a beneficial ownership in, the growing timber, and that therefore plaintiff could maintain an action of trespass against a mere stranger who cut and carried away parts of the timber, is not in conflict with a prior decision of the Supreme Court, but is correct. *Cooperage Co. v. Lumber Co.*, 4.

TRUSTS AND TRUSTEES.

1. **Trust Estate: Power of Trustee to Invest, Sell and Reinvest.** A clause of a will read: "I devise to my son J. H. Field, as Trustee for my daughter Lucy B. Shields, ten thousand dollars, which I wish him to invest in some safe stock, or in any way he may think best, and to pay over for the use of my daughter Lucy, the yearly profits, which it may produce, but the principal to remain for the use of her children; in case my daughter Lucy dies leaving no children, the money to return and be equally divided between my sons." *Held*, that this language conferred upon the trustee power to invest, sell and reinvest, in personal or real estate; and when the trustee invested the fund in land, by a conveyance which named him as grantee and as trustee for the uses and purposes in the clause mentioned, a life estate in Lucy and remainder in the children was not so created that the trustee could not thereafter sell the land and invest the fund in other property. The power to sell and reinvest was not exhausted by the one investment in land. *Lawson v. Cunningham*, 128.
2. ———: ———: **Ultra Vires: Cure.** Even if it be conceded that, under said clause of the will, the trustee had no power to buy land, yet any subsequent act by which the wrong was righted and the trust fund returned intact into his hands was warranted and legally unobjectionable. *Ib.*
3. ———: **Substituted Trustee: Power to Sell Trust Land: Estoppel.** The *cestuis que trustent*, who, with actual notice, or with knowledge of facts demanding inquiry, have accepted the proceeds of a sale of land by a substituted trustee, have solemnly receipted to him for the full amount of the trust fund and have enjoyed and retain the fruits of such sale, cannot be heard in a court of conscience to say that the substituted trustee, under a clause of a will giving the original trustee power to invest the trust fund in real estate, had no power to sell the land, or that the court of the foreign State

TRUST AND TRUSTEE—Continued.

appointing him had no power to approve his sale of Missouri land; and whether such doctrine of preclusion be designated as *quasi-stoppel* or is more nearly akin to ratification or election, the result is the same—they cannot, under such circumstances, recover the land.

Held, by BOND, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the facts of the case do not show that the minor *cestuis que trustent* shared in the proceeds of the sale of the trust property by the substituted trustee, or that they had notice that when it was sold the proceeds were invested in other real estate the purchase price of which, when it was sold, was divided among them, nor do they show that it was so invested, and consequently the doctrine of *quasi-stoppel* does not apply to them. *Ib.*

ULTRA VIRES.

Public Utility: Corporate Powers. In determining whether or not a corporation is a public utility, the important thing is not what its charter says it may do, but what it actually does. If the things it does constitute it a public utility, it will not be heard to say that those things are *ultra vires* of its charter powers, or to urge its own wrongful aggressions to escape its obligations to render the public service. *State ex rel. Danciger v. Pub. Serv. Comm.*, 483.

VERDICT.

1. **Directed: Appellate Rule.** The appellate court will not interfere with the action of the trial court in refusing to direct a verdict for defendants where there was substantial evidence to support a verdict for plaintiff. *Laughlin v. Railway*, 459.
2. ———: ———: **All Evidence Considered.** The probative force of the substantial evidence necessary to sustain the verdict rendered for plaintiff is not to be tested by that adduced by him alone, although in passing on a demurrer thereto every reasonable inference deducible therefrom is to be taken as true; but it also may be aided by such of defendant's evidence that helps to make out plaintiff's case. *Ib.*
3. ———: **Inferences from Proven Facts: Proximate Cause.** The testimony of plaintiff, a brakeman of a freight train which had stopped to take water, was that after it had started and was running at a rate of five to seven miles per hour he attempted to swing himself upon a car by grasping an iron stirrup and was thereby lifted off the ground and while his feet were in mid-air they struck an obstacle, making a sound as of pieces of iron striking together; that the impact broke his hold on the stirrup, causing him to fall; and that when he recovered from a condition of unconsciousness he saw a keg of spikes near his feet. On the day of the accident the track at the point had been repaired, by taking out old and putting in new ties, and spikes had been pulled from the old ties, and inferably placed in the keg. *Held*, that the jury were authorized in making the inference that the railroad trackmen had left the keg at the place where it was found after the accident, and that under the facts proved and circumstances shown the plaintiff's fall was caused by his legs striking the keg. *Ib.*
4. ———: **Proximate Cause: Question for Jury.** The determination of the proximate cause of an injury, whether it be the original negligence of one party or the intermediate negligence of another, is ordinarily one for the jury. *Ib.*

VERDICT—Continued.

5. ———: ———: **Character of Evidence.** Direct evidence to establish negligence is not required, but it may be sufficiently shown by facts and circumstances. The proof must do more than raise a conjecture as to the cause of the injury; it must show with reasonable certainty that the cause for which defendant is sought to be held liable produced the injury; but it is only when the evidence with all the inferences that the jury may reasonably draw therefrom is insufficient to support a finding for plaintiff, that the court is authorized to direct a verdict for defendant. *Laughlin v. Railway*, 459.
6. **Excessive: \$10,772: Simulated Injuries.** Where there is substantial evidence that plaintiff's injuries resulting from the accident were a bruise of the thigh and back, hydrocele of the right testicle, rupture of a ligament of the cervical vertebrae resulting in the depression of the seventh vertebra, an injury to the spinal cord, paralysis of the lower limbs involving the motor and sensory nerves, a subluxation of the lumbar vertebrae, anesthesia of the muscles and nerves of the back extending from the shoulders to the waist line, a loss of the reflexes of the knees and feet, traumatic neurasthenia, and that the injuries are progressive and permanent, the court cannot say, even though other medical experts gave contradictory testimony, that the injuries are feigned, or that a verdict for \$10,772 is excessive. *Ib.*
7. ———: **Federal Court Rule.** In cases coming within the purview of the Federal Employers' Liability Act, it is in harmony with the purposes of the statute to adopt the measure of damages sanctioned by the Federal courts, which is that no limitation is placed by the statute on the amount that may be recovered, except that of the damages actually sustained. *Ib.*
8. **Measure of Damages: Other Cases as Guide.** On account of the difference in the facts, there can be no hard-and-fast rule for the measure of damages in a personal injury case. A similarity in the awards in cases of like injuries may serve as a general guide, but it furnishes no exact rule by which the damages may be estimated in a given case. *Ib.*

WAIVER.

1. **Estate by Entirety: Claim of Homestead.** A widow, who does not know that she is the owner of an estate by the entirety in the land, does not waive her fee simple title to the entire estate by claiming a homestead interest after her husband's death. *Burke v. Murphy*, 397.
2. **Knowledge.** There can be no waiver without a knowledge of the rights waived and an intention to waive them. *Ib.*

WILLS.

1. **Trust Estate: Power of Trustee to Invest, Sell and Reinvest.** A clause of a will read: "I devise to my son J. H. Field, as trustee for my daughter Lucy B. Shields, ten thousand dollars, which I wish him to invest in some safe stock, or in any way he may think best, and to pay over for the use of my daughter Lucy, the yearly profits, which it may produce, but the principal to remain for the use of her children; in case my daughter Lucy dies leaving no children, the money to return and be equally divided between my sons." *Held*, that this language conferred upon the trustee power to invest, sell and reinvest, in personal or real estate; and when the trustee invested the fund in land, by a conveyance which named

WILLS—Continued.

- him as grantee and as trustee for the uses and purposes in the clause mentioned, a life estate in Lucy and remainder in the children was not so created that the trustee could not thereafter sell the land and invest the fund in other property. The power to sell and reinvest was not exhausted by the one investment in land. *Lawson v. Cunningham*, 128.
2. ———: ———: *Ultra Vires*: *Oure*. Even if it be conceded that, under said clause of the will, the trustee had no power to buy land, yet any subsequent act by which the wrong was righted and the trust fund returned intact into his hands was warranted and legally unobjectionable. *Ib*.
3. ———: *Substituted Trustee*: *Power to Sell Trust Land*: *Estoppel*. The *cestuis que trustent*, who, with actual notice, or with knowledge of facts demanding inquiry, have accepted the proceeds of a sale of land by a substituted trustee, have solemnly receipted to him for the full amount of the trust fund and have enjoyed and retain the fruits of such sale, cannot be heard in a court of conscience to say that the substituted trustee, under a clause of a will giving the original trustee power to invest the trust fund in real estate, had no power to sell the land, or that the court of the foreign State appointing him had no power to approve his sale of Missouri land; and whether such doctrine of preclusion be designated as *quasi estoppel* or is more nearly akin to ratification or election, the result is the same—they cannot, under such circumstances, recover the land. *Held*, by BOND, C. J., dissenting, with whom BLAIR and WILLIAMS, JJ., concur, that the facts of the case do not show that the minor *cestuis que trustent* shared in the proceeds of the sale of the trust property by the substituted trustee, or that they had notice that when it was sold the proceeds were invested in other real estate the purchase price of which, when it was sold, was divided among them, nor do they show that it was so invested, and consequently the doctrine of *quasi estoppel* does not apply to them. *Ib*.
4. *Will Contest*: *Testamentary Incapacity*: *Sufficient Evidence*. The testimony in this case, which was brought by children to set aside the will of their father, seventy-eight years old, made eighteen days before he committed suicide, is set out at length, and the conclusion reached that there was sufficient evidence to authorize the submission of the issue of *devisavit vel non* to the jury. *Wigginton v. Rule*, 412.
5. ———: ———: *Delusion*: *Sufficient Evidence*. The evidence in this case was sufficient to justify a submission to the jury of the question of whether testator, at the time he executed his will, was laboring under an insane delusion that undue intimate relations existed between his son-in-law and a young girl who was a member of his family, that such false and mistaken conception was not based upon fact, that he did not have before him evidence acting upon which any normal or rational mind would have formed such belief, and that the will was the offspring of such delusion. *Ib*.
6. ———: ———: *Insane Delusion*: *Pertinent Evidence*. There is no such thing as a delusion founded upon substantial facts; but it is not sufficient for a ruling as a matter of law that testator possessed no insane delusion, that testimony be produced at the trial that he had some evidence, even though of an unsubstantial character, for his belief that illicit relations existed between his

WILLS—Continued.

son-in-law and a girl in his family; but the question for determination is, did he have before him at the time he executed the will evidence acting upon which any normal or rational mind would have formed such a belief? If there is testimony from which the jury would be justified in finding that testator was insane on the subject of such an illicit intimacy, and that the will was the fruit of such insanity, then the existence of the delusion at the time the will was made, being a mistaken and false misconception, becomes a question for the jury. *Wigginton v. Rule*, 412.

7. ———: ———: **Subsequent Occurrences.** There is no hard-and-fast rule as to the incompetency of evidence on account of remoteness. Post cards written by testator a few days after execution of his will, to his granddaughter, there being no noticeable change in his mental condition between the two events, are competent evidence bearing on his testamentary capacity. *Ib.*
8. ———: ———: **Opinion of Lay Witnesses: Self-Invited Error.** An appellant, who by his conduct at the trial, invites the error of which he subsequently complains, whether it be in the instructions asked or the evidence produced, is not on appeal entitled to a ruling that such error was prejudicial. It is an invasion of the province of the jury to permit lay witnesses in a will contest to give their opinions that testator did not have sufficient mind to know the value of his property or to realize his relations towards his children; but if proponents themselves open wide the door to the admission of such opinions and invite them, both by the direct and cross-examination of witnesses, they will not on appeal be entitled to complain that the admission of the opinions of respondents' lay witnesses was prejudicial error. *Ib.*
9. ———: ———: **Inheritable Interest.** It is not error to refuse to instruct the jury that a granddaughter of testator, a daughter of an insane daughter, named as a devisee, will inherit no interest in his estate if the will is set aside, though it contains a correct statement of the law. It could not aid the jury in determining the issue of testamentary capacity. *Ib.*
10. ———: ———: **Formal Execution.** An instruction telling the jury that the will "was executed in conformity with the provisions of the law relating to the execution of wills" should not be given. Since the law requires a will to be executed by one of sound mind, its meaning is too obscure and uncertain; besides, where there is no controversy about the formal execution of the will, the jury need no instruction on the point. *Ib.*
11. **Attestation: Knowledge of Witnesses.** There can be no valid attestation of a will unless the attesting witnesses know at the time that the instrument is being made and attested as a will. *Cone v. Donovan*, 557.
12. ———: **Presumption of Knowledge: Genuine Signature.** If the instrument purports on its face to be a will and the signatures of the witnesses are conceded to be genuine and those witnesses, though still living, have forgotten the facts as to such attestation, the law may well presume, in the absence of contrary evidence, that all things connected with its execution and attestation were rightly done, and that the witnesses were informed that the instrument was a will; but such presumption cannot be indulged where the instrument does not purport to be a will; it will not be indulged if the instrument is in the form of a letter, and the maker concealed from his stenographer the name

WILLS—Continued.

of the alleged legatee and after the balance was written by her he wrote in the beneficiary's name, and after it was signed by him and the two witnesses he placed it in a sealed envelope and wrote on it: "In the event of my death I want this letter to be delivered unopened" to a designated friend, and then placed it in a vault among his papers, where it remained until after his death, twelve years later. *Ib.*

13. ———: ———: **Overcome by Evidence.** Even if the law, in the absence of contrary evidence will presume that witnesses whose signatures are conceded to be genuine, were informed by the maker that the instrument, which purports on its face to be a will, was his will, such presumption may be overcome by evidence; and where there is strong evidence to overcome it, the finding of the trial court against the paper will not be disturbed on appeal. *Ib.*

WITNESSES.

Competency: Sister of Deceased Donor of Bonds. Decedent by one letter addressed to two sisters gave one forty bonds and the other twenty, which he afterwards borrowed from them and did not return, and both bring separate actions against the administratrix for the value of the bonds given to them respectively. *Held*, that he made separate and distinct gifts to each, and though the gifts were made in the same transaction, yet as neither had any interest in the bonds intended for the other, neither is disqualified by the statute to testify as a witness for the other in her separate suit. *Townsend v. Schaden*, 227.

Rules of the Supreme Court of Missouri

REVISED AND ADOPTED APRIL 10, 1916.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse part, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

SUPREME COURT RULES.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

Rule 10.—“Appellant” and “Respondent:” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of section 2048, Revised Statutes 1909, file a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits when there are more than one, and said abstract shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

SUPREME COURT RULES.

Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13, and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under section 2048, R. S. 1909, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have

SUPREME COURT RULES.

been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.



